**Mondelez Global, LLC *and* Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, Local 719, AFL–CIO.** Cases 22–CA–174272, 22–CA–178370, 22–CA–178591, 22–CA–179007, 22–CA–180206, 22–CA–180213, 22–CA–181423 and 22–CA–183609

March 31, 2020

## DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On January 7, 2019, Administrative Law Judge Kenneth W. Chu issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party Union filed answering briefs, and the Respondent filed a combined reply brief to the answering briefs. The General Counsel also filed limited exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

The judge found, among other things, that the Respondent violated Section 8(a)(3) and (1) of the Act by suspending and then discharging employees Claudio Gutierrez, Bruce Scherer, and Nafis Vlashi because of their union activities at its Fair Lawn, New Jersey plant. The judge also found that, after the parties' collective-bargaining agreement had expired, the Respondent violated Section 8(a)(5) and (1) by unilaterally (1) lengthening the time required for employees to return to work from short-term disability (STD) leave, (2) eliminating the Union's right to meet separately with newly hired unit employees during their orientations, and (3) modifying the work schedules of Broken and Refused Product (B & R) department employees in June 2016 and, again, in December 2016. The judge also found that the Respondent violated Section 8(a)(5) and (1) by failing to furnish or timely furnish two sets of presumptively relevant information that the Union first requested on May 13, 2016, and July 7, 2016, respectively. The Respondent excepts to each of these violation findings.

The judge dismissed an allegation that the Respondent violated Section 8(a)(5) and (1) on or about April 11, 2016, by unilaterally departing from the use of seniority when selecting employees for temporary layoff by retaining eight newly hired employees who were in the shop-floor observation phase (second week) of their orientation. The General Counsel excepts to that dismissal.

We affirm all of the judge's findings of violations and dismissals, with the following clarifications.

*1. Unlawful Suspension and Discharge Findings.* The Respondent contended that Gutierrez, Scherer, and Vlashi were suspended and then discharged because a study of the Fair Lawn plant's high overtime costs revealed that they had falsified time records and had left their work areas without permission. The General Counsel and the Union countered that the three were suspended and discharged because of their open and forceful union activities. Because the reason for the suspensions and discharges was disputed, the judge applied the *Wright Line*[3] framework to determine whether those actions were unlawfully motivated.

Under *Wright Line,* the General Counsel bears the initial burden of establishing that an employee's union or other protected concerted activity was a motivating factor in the employer's adverse employment action. Id. at 1089. The Board has held that the General Counsel can meet this burden by establishing (1) union or other protected activity by the employee, (2) employer knowledge of that activity, and (3) antiunion animus, or animus against protected activity, on the part of the employer. See, e.g., *Consolidated Bus Transit*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009).[4] After the judge issued his decision in this case, the Board clarified the animus element of this test in *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 5–8 (2019). There, the Board explained that the General Counsel "does not *invariably* sustain his burden of proof under *Wright Line* whenever,

[1] The Respondent has implicitly excepted to some of the judge's credibility determinations. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In the absence of exceptions, we adopt the judge's dismissal of allegations that the Respondent violated Sec. 8(a)(5) and (1) by ceasing to honor new employee authorizations for dues deductions and Sec. 8(a)(3) and (1) by suspending employee Richard Nazzaro.

[2] We shall modify the judge's recommended Order to conform to the Board's standard remedial language and to our amended remedy. We shall substitute a new notice to conform to the Order as modified.

[3] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

[4] We adopt the judge's finding, for the reasons he stated, that the General Counsel proved that Gutierrez, Scherer, and Vlashi engaged in union activity and that the Respondent knew of that activity.

in addition to protected activity and knowledge thereof, the record contains *any* evidence of the employer's animus or hostility toward union or other protected activity." Id., slip op. at 7 (emphasis in original). "Instead, the evidence must be sufficient to establish that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee." Id., slip op. at 8.

The judge found that the Respondent harbored anti-union animus against Gutierrez, Scherer, and Vlashi. For the reasons that follow, we find that the evidence cited by the judge amply establishes that a causal relationship existed between these employees' union activities and the Respondent's adverse action against them, consistent with the principles stated in *Tschiggfrie*.

Gutierrez and Scherer had been union stewards for two decades; Vlashi was formerly a union steward for 8 years and had been president of the Union since January 2016. All three had been prominent advocates for the Union and were sometimes locked in heated disputes with the Respondent. For example, Gutierrez had protested the Respondent's unlawful unilateral changes. Scherer had challenged, successfully, its use of outside contractors to perform overtime work belonging to unit employees. In his role as union president, Vlashi had participated in difficult negotiations for a successor contract and had opposed the Respondent's outsourcing of unit work to Mexico. As a protest measure, Gutierrez, Scherer, and Vlashi hung an American flag at the entrance to the employee locker room. The Respondent ordered them to remove it. Thereafter, Gutierrez and Scherer, along with other employees, added union logos to the back of company-issued t-shirts and wore them to work. The Respondent directed these employees, including Gutierrez and Scherer, to remove and return the shirts. These protests, and the Respondent's reactions to them, took place within a few months of the Respondent's decision to suspend and discharge the three employees. This temporal proximity provides some evidence of a causal link between the employees' union activities and their loss of employment. See, e.g., *Velox Express, Inc.*, 368 NLRB No. 61, slip op. at 10–11, 29 (2019) (affirming judge's finding that timing supported prima facie case); *Napleton 1050, Inc. d/b/a Napleton Cadillac of Libertyville*, 367 NLRB No. 6, slip op. at 15 (2018) (citing cases).

The Respondent attempts to explain the timing of the three employees' suspensions in June 2016 by asserting that, in May, it had begun compiling evidence of time theft by certain employees as part of its inquiry into excessive overtime at the Fair Lawn plant. That explanation fails, however, for several reasons.

First, at the hearing, the Respondent's witnesses repeatedly testified that the purpose of the overtime study was not to create grounds for discipline but rather to assess and rectify the plant's unacceptably high overtime costs. Yet once the Respondent had discharged Gutierrez, Scherer, and Vlashi, it immediately halted the study without taking any action with regard to its overtime cost problem. As the judge found, the Respondent failed to offer a credible reason for this sudden change of course. The Respondent's abrupt and insufficiently explained abandonment of the overtime study at the Fair Lawn plant, contrary to its stated purpose, suggests that, whatever the initial reason for the study, in practice it devolved into a pretext for ridding the Respondent of three high-profile and combative union representatives. See, e.g., *GATX Logistics, Inc*., 323 NLRB 328, 335–336 (1997) (inconsistent rationales and failure to address asserted problem underlying discharge indicate pretext), enfd. 160 F.3d 353 (7th Cir. 1998).

Second, the judge found, and we agree, that the Respondent's investigations of the three employees' alleged misconduct were truncated and that neither the employees nor the Union had a reasonable opportunity to respond. The Board, with court approval, has often found similar evidence probative of unlawful animus. See, e.g., *Airgas USA, LLC*, 366 NLRB No. 104, slip op. at 3 fn. 12 (2018) (employer's failure to conduct a meaningful investigation was proof of discriminatory intent), enfd. 916 F.3d 555 (6th Cir. 2019); *New Orleans Cold Storage Co*., 326 NLRB 1471, 1477 (1998), enfd. 201 F.3d 592 (5th Cir. 2000).

Third, the Respondent suspended and discharged Gutierrez, Scherer, and Vlashi for falsifying time records, while taking no action against other employees who engaged in the same misconduct, some of whom were more egregious offenders than the discriminatees. In the course of its overtime study, the Respondent compiled two lists: employees with the most turnstile swipes (indicating entrances into and exits from the plant) over the course of 16 weeks, and employees with the most overtime during those same 16 weeks. The idea was that employees with the most overtime would be inside the plant, working, and therefore should not have many turnstile swipes. As a result, the assumption was that working high overtime hours *and* having numerous turnstile swipes would be indicative of not working while on overtime—i.e., of stealing time.

The Respondent determined that five employees had both high overtime hours and high turnstile swipes. The high number for one of the five, Tommy Jacobs, was explained by the nature of his duties. Of the four remaining employees, however, the Respondent took action against only one: Vlashi. With regard to those employees who only had a high number of turnstile swipes, the

Respondent compiled a "high turnstile swipes" list and, thereafter, reviewed the video records from a security camera located at the turnstiles. However, even though Vlashi was sixth on the "high turnstile swipes" list, Scherer was thirteenth, and Gutierrez did not even appear on list, the Respondent chose to examine only the video evidence pertaining to those three employees.[5] The judge found that the Respondent never credibly explained why it targeted Vlashi, Scherer, and Gutierrez in this way. The judge also detailed other evidence of the Respondent's disparate treatment of these three employees.

This evidence supports an inference that stealing time was not the real reason why Gutierrez, Scherer, and Vlashi were discharged. See, e.g., *Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 223–224 (D.C. Cir. 2016) (lack of evidence that employer discharged others for similar offenses shows pretext); *Tschiggfrie*, supra, 368 NLRB No. 120, slip op. at 5 (same); *La Gloria Oil & Gas Co*., 337 NLRB 1120, 1124 (2002) (finding that disparate treatment evidences pretextual motive), affd. 71 Fed. Appx. 441 (5th Cir. 2003). As recognized in *Electrolux Home Products*, 368 NLRB No. 34 (2019), "the Board may infer from the pretextual nature of an employer's proffered justification that the employer acted out of union animus, '*at least where . . . the surrounding facts tend to reinforce that inference*.'" Id., slip op. at 3 (quoting *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966) (emphasis in *Electrolux*)). The surrounding facts here serve to reinforce that inference, including the Respondent's cursory investigations and, especially, its sudden and insufficiently explained abandonment of the overtime study after Vlashi, Scherer, and Gutierrez were discharged, without addressing the systemic overtime issue at Fair Lawn, contrary to the study's stated purpose.

In sum, for the reasons stated above and by the judge, we affirm the judge's finding that the General Counsel met his initial *Wright Line* burden.[6] We also agree, for the reasons stated by the judge, with his finding that the Respondent failed to prove that it would have suspended and discharged Vlashi, Scherer, and Gutierrez even absent their union activities. Accordingly, we affirm the judge's finding that the Respondent violated Section 8(a)(3) and (1) by suspending and discharging Nafis Vlashi, Bruce Scherer, and Claudio Gutierrez.

*2. Unilateral Increase in Time to Return to Work from STD Leave*. We affirm the judge's finding that the Respondent violated Section 8(a)(5) and (1) by unilaterally increasing the time required for employees to return from short-term disability leave to active, paid work. Employees historically had been able to return to active duty within about a day after being medically cleared to work. Under its revised policy, the Respondent extended that timeframe from at least 2 to as many as 7 workdays. It did so without giving the Union notice and opportunity to bargain. The Respondent defended this admittedly unilateral change by invoking the "sound arguable basis" standard. Under this standard, an employer's unilateral action may be lawful if it is based on a reasonable interpretation of language contained in a collective-bargaining agreement. That standard, however, applies only to allegations that an employer has unlawfully modified a provision of a collective-bargaining agreement during its term in violation of Section 8(a)(5) of the Act within the meaning of Section 8(d). It is inapplicable where, as here, the allegation is that the employer has unilaterally changed a term and condition of employment after the collective-bargaining agreement has expired. See, e.g., *Bath Iron Works Corp*., 345 NLRB 499, 501–503 (2005) (explaining the difference between contract modification cases to which the "sound arguable basis" test applies and unilateral change cases), affd. sub nom. *Bath Marine Draftsmen's Assn. v. NLRB*, 475 F.3d 14 (1st Cir. 2007). Under the principles stated in *NLRB v. Katz*, 369 U.S. 736 (1962), the General Counsel establishes an unlawful unilateral change by showing "that there is an employment practice concerning a mandatory bargaining subject, and that the employer has made a significant change thereto *without bargaining*." *Bath Iron Works*, 345 NLRB at 501 (emphasis in original). Consequently, in affirming the judge's violation finding, we do not rely on the "sound arguable basis" test but rather on his finding that the increase in STD return time unilaterally changed the status quo.

*3. Unilateral Changes in B & R Department Schedules.* We affirm the judge's finding that the Respondent's unilateral changes in the B & R department shift schedules violated Section 8(a)(5) and (1) but find that a clarification of his legal analysis is required. In June 2016, the Respondent changed the shift start times in that department from 6 a.m., 2 p.m., and 10 p.m. to 7 a.m., 3 p.m., and 11 p.m., respectively, without first giving the Union

[5] In all, there were nine employees who ranked higher on the list than Gutierrez; number one on the list had retired and number four was Jacobs, whose unique circumstances are discussed above.

[6] We also note that the Respondent's unlawful unilateral changes and refusals to furnish relevant information, discussed below, provide additional support that the General Counsel met his prima facie case to demonstrate that the Respondent harbored union animus. See, e.g., *Kitsap Tenant Support Services, Inc*., 366 NLRB No. 98, slip op. at 12 (2018) (employer's bargaining violations "further demonstrate its animus"); *Circle City Asphalt, LLC*, 330 NLRB 282, 285 (1999) (Board adopts judge's *Wright Line* violation finding based, in part, on his conclusion that Section 8(a)(5) violations "constitute[d] evidence of union animus").

reasonable advance notice of the change and an opportunity to request bargaining. In December 2016, after the Union had filed an unfair labor practice charge, the Respondent changed those start times back, again without giving the Union notice and opportunity to bargain. The Respondent defended these changes as based on a plausible interpretation of an article in the expired collective-bargaining agreement, and the judge rejected the defense in part on the basis that the Respondent's interpretation of the agreement was not plausible. To this extent, the judge applied the "sound arguable basis" standard in deciding this allegation, which is inapplicable for the reasons stated above. Applying the unilateral change standard, there is no dispute that the B & R department shift schedules had been fixed for some time until the Respondent altered them twice in 2016. Likewise, there is no question that the Respondent changed the shift schedules materially without giving the Union notice and opportunity to request bargaining. On this basis, we affirm the judge's finding that the Respondent violated Section 8(a)(5) and (1).

*4. Dismissal of Allegation of Unilateral Departure from Use of Seniority When Selecting Employees for Layoff.* The judge dismissed the allegation that the Respondent unilaterally changed its layoff-by-seniority policy in violation of Section 8(a)(5) and (1) when, in April 2016, it laid off 44 employees for 1 week while retaining eight newly hired employees who were in their second week of orientation and were observing, but not performing, work on the shop floor. In so ruling, the judge found the Respondent's interpretation of the expired contract to be "reasonable and plausible," and he relied on the "sound arguable basis" standard. Again, this test is inapplicable for the reasons stated above.

We nevertheless agree with the judge's dismissal of this complaint allegation because the General Counsel failed to prove a status quo of laying off new employees in their second week of orientation before more senior employees. There is no record evidence involving the treatment, for layoff purposes, of new employees in week two of orientation. However, there is evidence that the Union had allowed the Respondent to exclude newly hired employees in week one of orientation from a previous layoff. There was also testimony that the Union filed but then withdrew a grievance regarding another layoff that excluded newly hired employees. Accordingly, in affirming the judge's dismissal of this allegation, we rely on the General Counsel's failure to prove that including employees still in orientation in layoffs determined by seniority was an established term or condition of employment. Without proof of such an established practice, the General Counsel has failed to establish a unilateral change. See, e.g., *Sunoco, Inc.*, 349 NLRB 240, 244 (2007).

## AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative actions designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(3) and (1) by suspending and discharging employees Claudio Gutierrez, Bruce Scherer, and Nafis Vlashi, we shall order the Respondent to offer them full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and to make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), we shall also order the Respondent to compensate Gutierrez, Scherer, and Vlashi for their reasonable search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

Additionally, we shall order the Respondent to compensate Gutierrez, Scherer, and Vlashi for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and to file with the Regional Director for Region 22, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each of them. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). We also shall order the Respondent to remove from its files any references to the unlawful suspensions and discharges of Gutierrez, Scherer, and Vlashi and to notify them in writing that this has been done and that the unlawful suspensions and discharges will not be used against them in any way.

Further, having found that the Respondent violated Section 8(a)(5) and (1) by making certain unilateral changes to employment terms and conditions, we shall order the Respondent to rescind the unilateral changes[7] and restore

[7] To avoid unfavorable consequences for affected employees, remedies affecting B & R department work schedules are conditioned on

the status quo. We also shall order the Respondent to make employees whole for any losses sustained as a result of the unlawful changes in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as set forth in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. In addition, in accordance with *AdvoServ,* supra, we shall order the Respondent to compensate employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and to file with the Regional Director for Region 22, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each employee.

Moreover, having found that the Respondent violated Section 8(a)(5) and (1) by failing to provide the Union with relevant information that was first requested on May 13, 2016, and July 7, 2016, and by unreasonably delaying in furnishing requested information, we shall order the Respondent to timely provide that information to the Union to the extent it has not already done so.

Finally, the judge's recommended order included a broad order to cease and desist from violating the Act "in any other manner," and a provision requiring the Respondent to mail copies of the notice to Gutierrez, Scherer, and Vlashi. The judge did not justify these remedies, and although the Respondent did not relevantly except, the Board has broad discretion under Section 10(c) of the Act to fashion appropriate remedies and may exercise its discretion to do so even in the absence of exceptions. See, e.g., *Indian Hills Care Center*, 321 NLRB 144, 144 fn. 3 (1996).

A broad cease-and-desist order is warranted when a respondent has been shown to "have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." *Hickmott Foods*, 242 NLRB 1357, 1357 (1979). The General Counsel has not established that the Respondent is a recidivist. Additionally, the violations we have found in this case are not so egregious or widespread as to warrant a finding that the Respondent has evinced a general disregard for employees' rights under the Act. Consequently, we have substituted a narrow cease-and-desist order for the broad order recommended by the judge.

As to the notice-mailing remedy, the Board does not typically require notices to be mailed to unlawfully discharged employees. Since the Respondent will be required to offer reinstatement to the three discriminatees within 14 days from the date of the Order, and since it must post the remedial notice within 14 days after service by the Region and must keep it posted for 60 days thereafter, Vlashi, Scherer, and Gutierrez will have the opportunity to read the posted notice, assuming they accept the offer of reinstatement and do so reasonably promptly. We have stressed that, like other extraordinary relief, notice mailing not conditioned on a plant closing is "*rarely*" granted. See *Delta Sandblasting Co*., 367 NLRB No. 17, slip op. at 1 fn. 3 (2018) (emphasis in original). The judge offered no reason for departing from this long-settled Board norm, and we have omitted the recommended notice-mailing remedy.[8]

## ORDER

The National Labor Relations Board orders that the Respondent, Mondelez Global, LLC, Fair Lawn, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, suspending, or otherwise discriminating against employees because of their support for the Union or because they have otherwise engaged in protected concerted activities.

(b) Unilaterally changing terms and conditions of employment of its unit employees, including increasing the amount of time required to return to work from short-term disability leave, eliminating the Union's right to meet privately with newly hired unit employees during their orientations, and modifying the work schedules of unit employees in the B & R department.

(c) Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees and by unreasonably delaying in furnishing requested information.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Claudio Gutierrez, Bruce Scherer, and Nafis Vlashi full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Claudio Gutierrez, Bruce Scherer, and Nafis Vlashi whole for any loss of earnings and other benefits

a request by the Union.

[8] We also have corrected several inadvertent errors in the judge's recommended order.

suffered as a result of the discrimination against them, in the manner set forth in the amended remedy section of this decision.

(c) Compensate Claudio Gutierrez, Bruce Scherer, and Nafis Vlashi for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 22, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each of them.

(d) Within 14 days from the date of this Order, remove from its files any references to the unlawful suspensions and discharges, and within 3 days thereafter, notify Claudio Gutierrez, Bruce Scherer, and Nafis Vlashi in writing that this has been done and that the suspensions and discharges will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amounts of backpay due under the terms of this Order.

(f) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> The baking, packing, warehouse, environmental, maintenance and repair, distribution and garage employees working at the Fair Lawn facility, excluding supervisors.

(g) Rescind the increase in the amount of time required to return from short-term disability leave that was unilaterally implemented on or about March 15, 2016.

(h) Restore the Union's right to meet privately with newly hired employees during their orientations that was unilaterally eliminated in or around March 2016.

(i) On request by the Union, rescind any unilateral changes to the work schedules of B & R department employees.

(j) Make whole affected employees in the above-described unit for any loss of earnings or other benefits resulting from the unlawful unilateral changes.

(k) Compensate such affected employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 22, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each employee.

(l) Furnish to the Union in a timely manner the information that it first requested on or about May 13, 2016, and July 7, 2016, to the extent it has not already done so.

(m) Within 14 days after service by the Region, post at its Fair Lawn, New Jersey facility copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notice shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at its Fair Lawn facility at any time since March 15, 2016.

(n) Within 21 days after service by the Region, file with the Regional Director for Region 22 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 31, 2020

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John F. Ring, Chairman

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Marvin E. Kaplan, Member

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William J. Emanuel, Member

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(SEAL) NATIONAL LABOR RELATIONS BOARD

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge, suspend, or otherwise discriminate against you for supporting the Union or otherwise engaging in protected concerted activities.

WE WILL NOT unilaterally change terms and conditions of employment of our unit employees, including increasing the amount of time required to return to work from short-term disability leave, eliminating the Union's right to meet privately with newly hired unit employees, and modifying the work schedules of unit employees in the B & R department.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees or by unreasonably delaying in furnishing requested information.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Claudio Gutierrez, Bruce Scherer, and Nafis Vlashi full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Claudio Gutierrez, Bruce Scherer, and Nafis Vlashi whole for any loss of earnings and other benefits resulting from their suspensions and discharges, less any interim earnings, plus interest, and WE WILL also make them whole for any reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Claudio Gutierrez, Bruce Scherer, and Nafis Vlashi for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 22, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each of them.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful suspensions and discharges of Claudio Gutierrez, Bruce Scherer, and Nafis Vlashi, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the suspensions and discharges will not be used against them in any way.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

> The baking, packing, warehouse, environmental, maintenance and repair, distribution and garage employees working at the Fair Lawn facility, excluding supervisors.

WE WILL rescind the increase in the amount of time required to return from short-term disability leave to active, paid work.

WE WILL restore the Union's right to meet privately with newly hired employees during their orientations.

WE WILL, on request by the Union, rescind any unilateral changes to the work schedules of B & R department employees.

WE WILL make whole affected employees in the above-described unit for any loss of earnings or other benefits resulting from our unlawful unilateral changes.

WE WILL compensate such affected employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 22, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each employee.

WE WILL furnish to the Union in a timely manner the information that it first requested on or about May 13, 2016, and July 7, 2016, to the extent we have not already done so.

MONDELEZ GLOBAL, LLC

The Board's decision can be found at www.nlrb.gov/case/22-CA-174272 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

*Tara Levy, Esq.,* for the General Counsel.
*Donald D. Gamburg, Esq. (Ogletree, Deakins, Nash, Smoak & Stewart, P.C.),* for the Respondent.
*Joshua B. Shiffrin, Esq.* and *Julie A. Donahue, Esq. (Bredhoff & Kaiser, P.L.L.C.),* for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

KENNETH W. CHU, Administrative Law Judge. This case was tried in Newark, New Jersey, on November 28, 30, December 1, 2017, March 12, 13, 14, and 15, 2018. The Bakery, Confectionery, Tobacco Workers, and Grain Millers International Union, Local 719, AFL–CIO (Union) filed charges on April 15, June 14, 17, 23, July 14, August 3, and September 1, 2016,[1] with the National Labor Relations Board (NLRB). A consolidated complaint was issued by Region 22 on December 30 alleging violations of the National Labor Relations Act (Act). Mondelez Global, LLC (Respondent), timely filed an answer denying the material allegations in the complaint (GC Exh. 1).[2]

On the entire record, including my assessment of the witnesses' credibility and my observation of their demeanor at the hearing and corroborating the same with the adduced evidence of record, and after considering the posthearing briefs filed by the General Counsel, the Union and the Respondent,[3] I make the following

### JURISDICTION AND UNION STATUS

The Respondent operates a business of a bakery production plant with a warehouse facility and office in Fair Lawn, New Jersey, where it derived gross revenue in excess of $250,000 and purchased and received goods in the course and conduct of its operations valued in excess of $50,000 directly from points outside the State of New Jersey. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It is not disputed, and I find that the Bakery, Confectionery, Tobacco Workers, and Grain Millers International Union, Local 719, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

### ALLEGED UNFAIR LABOR PRACTICES

The enumerated paragraphs in the consolidated and amended complaint state that

> 23. On or about June 13, 2016, Respondent, by its agent, Don Kalemba, suspended its employee, Richard Nazzaro.
> 24. a. On or about June 15, 2016, Respondent, by its agent, Erica Clark-Muhammad,suspended its employee, Claudio Gutierrez.
> b. On or about July 1, 2016, Respondent, by its agent, Erica Clark-Muhammad, terminated its employee, Claudio Gutierrez.
> 25. a. On or about June 15, 2016, Respondent, by its agent, Erica Clark-Muhammad,suspended its employee, Bruce Scherer.
> b. On or about July 1, 2016, Respondent, by its agent, Erica Clark-Muhammad, terminated its employee, Bruce Scherer.
> 26. a. On or about June 15, 2016, Respondent, by its agent, Erica Clark-Muhammad, suspended its employee, Nafis Vlashi.
> b. On or about July 1, 2016, Respondent, by its agent, Erica Clark-Muhammad, terminated its employee, Nafis Vlashi.
>
> 28. a. On about March 15, 2016, the Respondent changed the length of time an employee must wait after submitting a doctor's note before returning to work from an absence of five or more days;
> b. In about April 2016, the Respondent selected employees for layoff who were not the most junior employees, contrary to the employer's policy of laying off employees by seniority;
> c. In about April 2016, by Human Resources Manager Erica Clark-Muhammad, the Employer began refusing access by the Union representatives to new hires during their orientation;
> d. In about June 2016, the Respondent changed the work schedules of the B and R Processors who work in its warehouse;
> e. In about December 2016, the Respondent changed the work schedules of the B and R Processors who work in its

[1] All dates are in 2016 unless otherwise indicated.

[2] The exhibits for the General Counsel are identified as "GC Exh.," "Charging Party's exhibits are identified as "CP Exh.," and Respondent's exhibits are identified as "R. Exh." The closing briefs are identified as "GC Br." and "R. Br." for the General Counsel and the Respondent, respectively and "CP Br." for the Charging Party Union. The hearing transcript is referenced as "Tr."

[3] The counsel for the Charging Party Union and the General Counsel moved to submit a "corrected version" of CP Exh. 15 posthearing and the Respondent opposed the submission on June 11, 2018. Inasmuch as the record was closed on March 15 except for posthearing briefs, I find that it would be inappropriate to reopen the record without the opportunity for the counsel for the Respondent to examine and inquire about the documents and potentially subpoena witnesses named in the documents in the "revised" CP Exh. 15. In addition, I agree with the argument of the Respondent's counsel that the evidence contained in the "corrected version" of CP Exh. 15 is not newly discovered evidence.

warehouse;

f. In about May 2016, by Human Resources Assistant Tasha McCutcheon, the employer began having one of its representatives accompany the Union representative when he met with employees at new orientation; and

g. In about August 2016, the Respondent began requiring employees to complete "Behavior Observation Sheets" describing the behavior of a coworker.[4]

31. a. Since about May 13, 2016, the Union requested that the Respondent provide it with the names of anyone disciplined for violations of its clock-in-clock-out policy from March 1, 2006 through March 1, 2016.

b. Since about July 7, 2016, the Union requested that the Respondent provide it with information concerning new hires.

32. The information requested by the Union as described in paragraph 31(a) and (b) is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the Unit.

33. a. Since about May 2016, Respondent has failed and refused to provide the Union with the information described in paragraph 31(a).

b. Since about July 2016, Respondent has failed and refused to provide the Union with the information described in paragraph 31(b).[5]

35. In and after May 2016, the Respondent failed to continue in effect all the terms and conditions of the collective-bargaining agreement by ceasing to honor employee authorizations for dues deductions.

The complaint alleges that Respondent engaged in the conduct described above in paragraphs 23 through 26 because the named employees of Respondent assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities in violation of Section 8(a)(3) and (1) of the Act.

The complaint alleges that Respondent engaged in the conduct described in paragraphs 28(a) through (g), 30, and 33 without affording the Union an opportunity to bargain collectively with Respondent with respect to the conduct in violation of Section 8(a)(5) of the Act.

Finally, the complaint alleges that by the conduct described in paragraph 35, the Respondent failed and refused to bargain with the Union in violation of Section 8(d) of the Act.

## FINDINGS OF FACT

### *a. Background*

The Respondent operates a business of a bakery production plant with a warehouse facility and office in Fair Lawn, New Jersey. The facility produces Ritz crackers, Oreo cookies, and other baked products. The Bakery, Confectionery, Tobacco Workers, and Grain Millers International Union (BCTGM), Local 719, AFL–CIO represents the baking, packing, warehouse, environmental, maintenance and repair, distribution and garage employees (excluding supervisors) working at the facility. Local 719 has been the exclusive bargaining representative of the production employees in the facility since 1958. The Respondent's predecessor, Kraft Foods Global, Inc., and the Union were parties to a collective-bargaining agreement, effective February 29, 2012, through February 29, 2016 (GC Exh. 3). In conjunction with BCTGM and other BCTGM locals, Local 719 began negotiations with the Respondent for a successor contract in spring 2016. According to the Union, negotiations have not been successful and the BCTGM and its affiliates began a national boycott campaign against the Respondent for outsourcing production work to Mexico.

### *b. The Local 719 union activities in Spring 2016 and the Respondent's antiunion animus*

As part of the publicity campaign against the outsourcing and the failure to reach a contract, Local 719 engaged in several union activities, such as holding union rallies in front of the Fair Lawn plant in April and May; distributed union literature at Respondent sponsored events; posted union activities, such as the rallies, on Facebook; organized a day where all union members wore T-shirts with a defiant union logo while working in the plant; placed an American flag by the employees' locker rooms; and distributed union literature in the employee cafeteria and other areas in the plant (further discussed below). As of the date of trial, a successor agreement has not been reached. The counsel for the General Counsel contends that the Respondent was not happy with the union activities and engaged in antiunion animus conduct during this spring timeframe.

Stanley Milewski (Milewski) testified that he is the financial secretary treasurer and business agent for the Union for the past 5 years. Milewski handles contracts, financial matters, dues remittances from members, and other administrative matters for the Union. Milewski also served as the union local president from 2006 to 2012.

Milewski testified that the Union and Respondent met to negotiate a new contract from February through April 2016 (Tr. 107). As part of the campaign for a new contract and to protest the outsourcing of production to a foreign country, the Union held rallies in front of the Fair Lawn plant on April 25 and 26. Milewski stated that the rallies were publicized on his Facebook page and pictures of the union members at the rallies were posted on Facebook (CP Exh. 3). Milewski believed that Respondent's management and supervisors had knowledge of the rallies since they were held in front of the plant.

Milewski complained of antiunion sentiments against the Local. Milewski recalled an incident when he was refused

[4] At the hearing, the counsel for the General Counsel withdrew the allegation in paragraph 28(c) ("In about April 2016, by Human Resources Manager Erica Clark-Muhammad, the Employer began refusing access by the Union representatives to new hires during their orientation") and corrected the year when the allegations occurred from 2006 to 2016 in par. 33(a) of the complaint (Tr. 10). The General Counsel also withdrew the allegation in pars. 28(g) ("In about August 2016, the Respondent began requiring employees to complete Behavior Observation Sheets describing the behavior of a coworker") in the consolidated and amended complaint (Tr. 661).

[5] At the hearing, the counsel for the General Counsel amended pars. 33(a) and 33(b) to read as follows: "Respondent has unreasonably delayed, failing and refusing to provide the Union with the information" (Tr. 10).

attendance by Erica Clark-Muhammad (Clark-Muhammad),[6] the human resources director, at a labor management meeting on March 20 because Milewski was wearing a union logo shirt to the meeting. Milewski was told to take off his shirt for the meeting and when he refused, a guard escorted Milewski out. Milewski said that a guard later told him that he could return to the meeting after Clark-Mohammad said the shirt was not offensive to management.

Richard Nazzaro (Nazzaro) testified that he was employed as a welder mechanic for the past 9 years and had previously served as a shop steward and has served as the Union local vice president since 2016. Nazzaro said he was involved in the February-May contract negotiations and attended the April union rallies in front of the plant. Nazzaro recalled a total of four rallies on May 9, 12, April 25 and 26. Nazzaro said that he was coordinating the rallies and directing the union members during the rallies. Nazzaro said he spoke at the rallies and believed his supervisor saw him at the rallies.

Nazzaro also recalled an incident when most of the workers wore T-shirts with the union logo on the back of the shirt to the plant and were told by the plant manager to return their T-shirts to the Respondent. Nazzaro said that the T-shirts were issued by the Respondent, but once the shirts were received by the workers, they were kept and maintained by the employees (CP Exh. 17). Nazzaro believed that this incident occurred just prior to the February contract negotiations.

Claudio Gutierrez (Gutierrez) testified that he has been a shop steward for over 20 years and is involved in preparing the overtime schedule on behalf of the Respondent for the weekend and on overtime nights. Gutierrez is supervised by Jerry Luchansky and is informed by the supervisor whenever there is a need to have workers for overtime. Gutierrez would, in turn, canvas the workers to assess who would want overtime and prepare their overtime schedules in accordance with seniority.

Gutierrez complained about an incident in January 2016 when Luchansky used a contractor to perform overtime work on a Saturday. Gutierrez informed the supervisor that the contractor was not qualified to perform the work and there were employees who could do the work on Sunday. Luchansky rejected the suggestion and Gutierrez elevated the situation with John Lissi, who was the safety coordinator at the time; because Gutierrez believed that there was a safety issue with the unqualified contractor. According to Gutierrez, Lissi agreed and told the contractor to stop the work because they were not trained to clean the production equipment.

Gutierrez recalled a second incident involving utility workers in March 2016. He again told management that they were not qualified to do the work. Gutierrez said he was informed by the Shift Manager, Dan Calibrese, that the utility workers would remain to perform the work because the "union did not have a contract." Gutierrez also said that Dawn Sprague told him and other workers in March/April 2016 that they did not have a contract and if "they don't do what is told, they will be fired." Sprague was the HR supervisor at the time. Gutierrez told Sprague that the Union still has a contract under the expired contract.

Gutierrez was aware of the union rallies but did not participate in them. Gutierrez was involved in the union logo T-shirt incident in February and was told by Charlotta Kuratli, the plant manager at the time, to return his shirt.

### THE ALLEGED UNILATERAL CHANGES IN VIOLATION OF SECTION 8(A)(5) OF THE ACT

The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing changes to the terms and conditions of the workers without first bargaining with the Union (GC Br. at 8). The consolidated and amended complaint alleges that Respondent violated Section 8(a)(5) and (1) of the Act when (1) On about March 15, 2016, the Respondent changed the length of time an employee must wait before returning to work after submitting a doctor's note when absent for 5 or more days; (2) In about April 2016, the Respondent selected employees for layoff who were not the most junior employees, contrary to the employer's policy of laying off employees by seniority; (3) In about May 2016, the Respondent by HR Assistant Tasha McCutcheon, demanded the employer have one of its representatives accompany Milewski when he met with employees at new orientation; and 4) In about June and December 2016, the Respondent changed the work schedules of the B and R Processors who work in its warehouse (GC Br. at 6–8).

#### Applicable Legal Standards

Section 8(a)(5) of the Act requires an employer to provide its employees' representative with notice and an opportunity to bargain before instituting changes in any matter that constitutes a mandatory bargaining subject. *NLRB v. Katz*, 369 U.S. 736 (1962); *Toledo Blade Co*., 343 NLRB 385 (2004). The duty to bargain in good faith includes a duty to abstain from unilaterally changing terms and conditions of employment without first bargaining to impasse with the designated representative regarding the changes. *NLRB v. Katz,* above. In a unilateral-change case, "the relevant inquiry . . . is whether any established employment term on a mandatory subject of bargaining has been unilaterally changed." *Daily News of Los Angeles v. NLRB*, 73 F.3d 406, 411 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997). An unlawful unilateral change "frustrates the objectives of Section 8(a)(5)," because such a change "'minimizes the influence of organized bargaining' and emphasizes to the employees 'that there is no necessity for a collective bargaining agent.'" *Pleasantview Nursing Home v. NLRB*, 351 F.3d 747, 755 (6th Cir. 2003) (quoting *Katz*, supra at 744, and *Loral Defense Systems-Akron v. NLRB,* 200 F.3d 436, 449 (6th Cir. 1999)); *Mercy Hospital of Buffalo*, 311 NLRB 869, 873 (1993).

Under the unilateral change doctrine, an employer's duty to bargain under the Act includes the obligation to refrain from changing its employees' terms and conditions of employment without first bargaining to impasse with the employees' collective-bargaining representative concerning the contemplated changes. The Act prohibits employers from taking unilateral action regarding mandatory subjects of bargaining such as rates of pay, seniority, wages, hours of employment and other conditions of employment. Notably, an employer's regular and

[6] Clark-Muhammad was the former human resources manager for the Respondent at the time of these events. Clark-Muhammad was not called to testify by the Respondent (Tr. 1189).

longstanding practices that are neither random, nor intermittent become terms and conditions of employment even if those practices are not required by a collective-bargaining agreement. *Mike-Sell's Potato Chip Co*., 360 NLRB 131, 138–139 (2014), enfd. 807 F.3d 318 (D.C. Cir. 2015) (noting that the party asserting the existence of a past practice bears the burden of proof on the issue, and that the evidence must show that the practice occurred with such regularity and frequency that employees could reasonably expect the practice to continue or reoccur on a regular and consistent basis).

Further, a unilateral change in a mandatory subject of bargaining is unlawful only if it is a "material, substantial, and significant change." *Flambeau Airmold Corp*., 334 NLRB 165 (2001), quoting *Alamo Cement Co*., 281 NLRB 737, 738 (1986).

In order to establish a violation of a unilateral change, the General Counsel must establish what the terms and conditions of employment were before the alleged change, and then establish what the terms and conditions of employment were after the change, and then compare the two. *Golden Stevedoring Co*., 335 NLRB 410, 435 (2001). A unilateral change is measured by the extent to which it departs from the existing terms and conditions affecting employees. *Crittenton Hospital*, 342 NLRB 686 (2004); *Southern California Edison Co*., 284 NLRB 1205 fn. 1 (1987). The unilateral changes are discussed in seriatim below.

1. The alleged unilateral change to the short-term disability leave policy

The Respondent has a short-term disability (STD) policy that required a worker on medical leave for 5 or more workdays to bring a medical note with no restrictions from the doctor before resuming work (GC Exh. 4). The worker must be cleared through the medical department at least 24 hours before the beginning of the worker's scheduled shift. The policy specifically states

> When you are able to return to work, you must "clear" through the Medical Department. You will need a note from your Doctor stating that you can return to work with "no restrictions." You are required to "clear" through the Medical Department at least twenty four (24) hours before the beginning of your scheduled shift.

It is not disputed that this policy of requiring the worker to be clear for work at least 24 hours before the start of the worker's scheduled shift has been in effect at least since 2012 since the policy referenced the Kraft Foods Company, the former employer.

On about March 15, 2016, the Respondent issued a revised policy (GC Exh. 5) that stated the following

> When you are coming back to work, your doctor's note must be brought in to our Medical Department BEFORE 10:00 a.m. on the Wednesday prior to the week that you are cleared to return to work. Failure to bring your note to Medical before 10 a.m. will result in you not being added back to the schedule for the following week.

Vlashi testified that he was on short- and long-term disability leave in 2009 and 2014. He stated that on both occasions, he was allowed to immediately work after returning with a medical clearance. Vlashi stated that on the 2009 occasion, he returned to work on a Friday and was allowed to begin working on Monday. Vlashi also stated that in 2014, he was out for 6 weeks; he was cleared by the medical department on a Wednesday and returned to work the following day on Thursday. Vlashi recalled that another worker was told in March 2016 that she couldn't return to work although she was cleared to work by the medical department within the 24-hour window period. Vlashi complained to Clark-Muhammad as to whether she cleared the policy change with the Union. Vlashi demanded that she needed to talk to the union over the change. According to Vlashi, Clark-Muhammad subsequently told him that the worker could return to work immediately. Vlashi was also informed at that moment that the policy was changed and that workers would be informed of the new policy in their next paycheck. Vlashi testified that the STD return policy was discussed at the April labor-management meeting. Vlashi and Milewski were told by Clark-Muhammad that "they (the Union) don't have a contract."

Gutierrez said that he argued with Clark-Muhammad in April 2016 on behalf of another returning employee from disability when he could not begin work after he was cleared to work the day before. Gutierrez said the worker was cleared the day before but was told he could not begin work in the middle of the week and needed to be cleared 5 days before starting work.

Milewski described his understanding of the return policy that was in place since 2012. He stated that once a doctor clears a worker, the worker would visit the medical department with the doctor's note. Milewski testified that if the worker is cleared on a Thursday, that worker could begin work on Friday. He also stated that if you are cleared to work on a Friday, the worker would begin work on Monday. Milewski said he had no knowledge of the revised policy until it was implemented on about March 15, 2016.

Milewski confirmed that there was an April 28 labor-management meeting about the new STD return policy. He told Clark-Muhammad and Plant Manager Kuratli that the policy change needed immediate attention. Milewski complained that the Union never had the opportunity to bargain over the change. Milewski testified he was told by Clark-Muhammad that the Respondent had the right to change the policy because too many employees were on disability and it was tough to schedule people to work. Milewski responded that scheduling workers for work was never a problem because the Respondent always needed people to work.

Discussion and Analysis

The counsel for the General Counsel argues that changing the short-term disability leave policy was a unilateral change that should have been bargained over with the Union prior to implementation. The Respondent counters that there was no "real" change to a policy that had always required 24 hours' notice before the next scheduled shift. The counsel for the Respondent argues that the March 2014 restatement of the policy was to clarify the fact that a worker returning from STD would necessarily have to be cleared by Wednesday in order to be scheduled by Thursday to begin work the following Monday. It is not disputed that shift schedules to begin on the Monday are done by the previous Thursday (R. Br. at 44).

It is obvious that when a worker is permitted to return to work

affects a term and condition of employment and is a mandatory subject for bargaining. It is also obvious that any change to the employer's return-to-work policy is a significant and material change. Contrary to the position of the Respondent, I find that there was indeed a change in the STD return policy and the change was much more than a clarification of the existing policy.

I find that the policy under the Kraft Company allowed workers to return from short-term disability leave if they are cleared by their physician at least 24 hours before the beginning of their scheduled shifts. This language is plain and not subject to interpretation. The only dispute over the language of this policy raised by counsel for the Respondent is that a worker returning from STD would not have a scheduled shift since that worker has been out of work for an indefinite period of time. As a consequence of not having a scheduled shift, a returning worker could not start until the following Monday. However, in my opinion, a reasonable reading of this policy means that a worker, who had a scheduled shift before being placed on STD, could return to that same shift upon being medically cleared to work, which was the past practice.

I credit the testimony of Milewski on this point when he testified that Clark-Muhammad told him that it was difficult to schedule so many workers returning from disability leave. So, the policy was changed in March to the advantage of the employer by not allowing any workers to begin work until the following Monday. Milewski's testimony was not rebutted because Clark-Muhammad did not testify. Even so, the testimony of Milewski on this point is reasonable and consistent with the corroborating testimony provided by Vlashi and Gutierrez. Vlashi testified that he represented a worker who was not allowed to work on Thursday after being cleared to return 24 hours before her scheduled shift. Gutierrez was told by Clark-Muhammad that another employee was not allowed to work for 5 days from the time he was medically cleared to return.

In both instances, the change in policy was substantial and material since it affected the amount of wages that worker would earn. "The vice involved in [a unilateral change] is that the employer has *changed* the existing conditions of employment. It is this *change* which is prohibited and which forms the basis of the unfair labor practice charge." *Daily News of Los Angeles*, 315 NLRB 1236, 1237 (1994) (Board's brackets) (quoting *NLRB v. Dothan Eagle, Inc.*, 434 F.2d 93, 98 (5th Cir. 1970) (court's emphasis)), enfd. 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997).

As such, I find that the Respondent violated Section 8(a) (5) and (1) of the Act when it unilaterally changed its short-term disability policy without providing notice to the Union and an opportunity to bargain over the change.

2. The unilateral change in the layoff seniority policy

On about the week of April 11, 2016, the Respondent temporarily laid-off 44 employees for 1 week (GC Exh. 15). Under article 5 of the expired contract in the event of a layoff, "employees on the M & R Department seniority list will be laid off in reverse order of seniority" (GC Exh. 3 at art. 5 at p. 8).

Prior to the laid-off, the Respondent hired eight employees (GC Exh. 10). The eight employees were not part of the Union during the first 30 days on the job (GC Exh. 10, art. 2-Membership). The eight employees were given classroom instructions during the 1st week and were on the floor to observe first-hand the plant's operations during their 2nd week of training. The new employees did not actually perform work and only shadowed the activities of the work force during this time.

Milewski testified that 45−55 employees were laid-off by the Respondent on April 11, 2016. He complained that eight junior employees were allowed to stay over the more senior employees who were laid-off. Milewski admitted that article 5 of the contract never applied to the new recruits but maintained that if an employee is on the production floor, that worker would be counted for purposes of the layoff. Milewski noted that once in the past, the Union allowed the Respondent to retain the junior employees during a layoff because they were still in their classroom training. He testified that the Union would allow junior employees to stay if they were in a training class but not when placed on the work floor (Tr. 105−107; 194).

Pamela DiStefano (DiStefano), who was the director of labor relations for the North America region at the time, testified that the layoffs were consistent with the CBA and past practices. DiStefano stated that during the second week of training, the new hires are only observing and still in orientation as to what their positions would entail. She testified that a grievance had been filed over retaining the newly hired in a similar situation in 2014 and the Union withdrew that grievance. (Tr. 1187, 1188, 1220; R. Exh. 2.)

Discussion and Analysis

The counsel for the General Counsel argues that the eight newly hired employees should have been laid-off in seniority order before the Respondent reached other employees for layoff. The General Counsel contends that retaining the new hires was a unilateral change of a mandatory subject for bargaining. The Respondent argues that there were no changes in the layoff policy and that its action was consistent with past practices.

Layoff policy and seniority are mandatory subjects for bargaining. The decision to lay off employees for economic reasons is clearly a mandatory subject of bargaining. Thus, absent extraordinary situations involving "compelling economic circumstances," an employer must provide notice to and bargain with the union representing its employees concerning both the layoff decision and the effects of that decision. *Lapeer Foundry & Machine, Inc.*, 289 NLRB 952, 954–955 (1988), citing numerous authorities, including *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086 (7th Cir. 1987). See also: *Pan American Grain Co.*, 351 NLRB 1412 (2007); *Tri-Tech Services*, 340 NLRB 894, 895 (2003).

Here, the dispute is over the effects of the decision as to which employees would be laid-off for 1 week. Milewski testified that new hires while in classroom training are not counted towards the layoffs. Milewski further testified that the new hires would be counted towards the number of layoffs when the trainees are on the work floor. DiStefano testified that new hires should not be counted in a layoff situation because they are not working and when on the work floor, the new hires are merely shadowing or observing the activities of the regular work force. DiStefano noted that a grievance filed by the Union in 2014 (R. Exh. 2) complained of new hires not being laid-off was withdrawn by the

Union. However, that grievance does not shed any light as to whether the Union had acquiesced to the employer in not laying off new hires during the second week since the grievance only complained about the first week of training.

The parties agreed that the first week (or classroom training) did not count towards the number of employees to be laid off. The dispute is over the second week of training when the new hires are on the work floor since there was never a past practice as to whether new hires are retained during a layoff while on their second week of orientation. The counsel for the General Counsel argues that new hires on the work floor are working and therefore, subject to the layoff policy. The counsel for the Respondent argues that the new hires are still in training while on the work floor and its position is a reasonable (plausible and sound) interpretation of the expired contract. Since neither party could definitely point to a past practice in the manner new hires have been laid-off in past situations, it would be reasonable to look at the expired contract for guidance.

I agree with the counsel for the Respondent. Under the expired contract, the workers on the M&R department seniority list will be laid-off in reverse order of seniority. I find that the Respondent has presented a "plausible interpretation" of the contract as to which employees should be laid-off. The parties agreed that the premise in retaining new hires while in classroom training during a layoff is because they are not workers engaged in a productive manner. In other words, the new hires were only learning new skills while in a classroom setting. Similarly, when placed on the work floor, these same new hires were still learning new skills, but in a production line setting.

DiStefano credibly testified that the new hires were on the work floor to observe the workers on the production line. There has been no evidence proffered by the General Counsel that the new hires were given a shift schedule or had actually replaced the regular work force on the production line. As such, I find that the Respondent's rationale in identifying the employees to be laid-off as a reasonable and plausible interpretation of the contract. As in *Monmouth Care Center*, 354 NLRB 11, slip op. at 58 (2009).

> Such a finding is insufficient to find a violation of the Act, since as long as Respondents have a "sound arguable basis," for its interpretations of the contract, no violation will be found. *Verizon*, 350 NLRB 542, 568 (2007); *Bath Iron Works*, 345 NLRB 499, 502 (2005), enfd. 475 F.3d 14, 22 (1st Cir. 2007); *Intrepid Museum*, 335 NLRB 1117 (2001); *Westinghouse Electric*, 313 NLRB 452, 453 (1993); *Atwood & Morill*, 289 NLRB 794, 795 (1988); *NCR Corp*., 271 NLRB 1212, 1213 (1984).

Here, I find that the Respondent had a "sound arguable basis" for its interpretation of the contract, and that the General Counsel has not established that the Respondent violated the Act. Accordingly, I recommend that this allegation in the complaint be dismissed.

3. The unilateral change in the joint orientation training of new hires

The counsel for the General Counsel alleges that the Respondent has periodically conducted 1-week orientations of new hires and, as a practice, would permit union representatives to meet separately with the new hires for approximately 1 hour during orientation week. The counsel for the General Counsel argues that this practice was changed when Clark-Muhammad refused to allow Milewski and other union representatives to meet privately with the new hires and the employer insisted on being present during the Union's portion of the orientation. It is argued that the change occurred without notice and bargaining with the Union.

The Respondent maintains that there have been several different practices in the past with the Union meeting separately with the new hires and on other occasions, in the presence of an employer representative. The Respondent argues that the past practice of having only the Union meet with the new hires was not a joint meeting and therefore, inconsistent with the contract.

Article 40 (GC Exh. 3 at p. 42) of the expired contract states that

> The Company and Union agreed to utilize a job orientation presentation for newly hired employees that will encompass, but not be limited to, the parties' commitment to quality, productivity, attendance, and the BCT-Nabisco Brands partnership. The details surrounding said presentation will be discussed and resolved on a local basis and will be implemented no later than January 1, 1991.

Milewski testified that orientation for new hires would usually start on a Monday for 5 days and at mid-week, the Union would have the opportunity to come in and meet in private with the new hires for 1 hour to collect employee information, union applications, have dues check-offs completed, and provide political action information. Milewski stated that the Union does not sit in during the management orientation of the new hires.

Milewski stated that this was the practice for 12 years until 2016 when Clark-Muhammad told him in March that the contract had expired and therefore the Union would not be permitted to speak separately with the new hires. Milewski also complained that management sat in during the Union's orientation session at the May 12 orientation. Milewski said he was informed by the Assistant HR Manager, Tasha McCutcheon and another HR representative, that they will attend the Union's meeting with the new hires. Milewski protested and was told by McCutcheon that is how the meeting will be conducted in the future. Milewski was informed that they were staying and he was told that this was the way it should have been done in the past and would be done in the future. Milewski complained that the Respondent never negotiated the change with the Union. Milewski stated that he did not participate in any orientation meetings after May 2016. According to Milewski, his understanding was that joint meetings in the expired contract meant that the employer and union would meet with the new hires but not necessarily at the same time (Tr. 215−218).

DiStefano testified that there were varying degrees of success in holding joint management and labor orientation meetings and admitted that prior to the expiration of the contract, joint and separate meetings had occurred. She was aware in 2013 or 2014 that union representatives were having closed-door meetings with new hires without management presence. After the expiration of the contract, DiStefano directed Clark-Muhammad to return to the practice of holding joint meetings during orientation

with the new hires. DiStefano said that after the contract expired, the Respondent will follow the letter of the contract with joint orientation of new hires and demand joint meetings throughout the orientation week. DiStefano stated that any past practice inconsistent with the contract did not survive the expiration of the contract. DiStefano insisted that Milewski did attend some joint meetings but under protest.

Discussion and Analysis

I find that there was indeed a unilateral change when the Respondent insisted on joint meetings throughout the entire 1-week training for the new hires. First, the expired contract did not state that there would be joint meetings throughout the 1-week training. The contract specifically stated that "The Company and Union agreed to utilize a job orientation presentation for newly hired employees…" This did not mean that the employer and the Union would be present at all times during this 1-week period. It was not disputed by the Respondent when Milewski testified that the Union was not present when the employer had its own private meeting(s) with the new hires.

An employer's regular and longstanding practices that are neither random nor intermittent become terms and conditions of employment, even where such practices are not expressly set forth within a collective-bargaining agreement. *Sunoco, Inc*., 349 NLRB 240, 244 (2007); *Garden Grove Hospital*, 357 NLRB 653, 657 (2011). As such, past practices survive the expiration of the contract even though they were not expressly set forth within the expired contract. The party asserting the existence of a past practice bears the burden of proof on the issue; specifically, the evidence must show that the practice occurred with such regularity and frequency that employees could reasonably expect the practice to reoccur on a consistent basis. *Palm Beach Metro Transportation, LLC*, 357 NLRB 180, 183–184 (2011), enfd. 459 Fed. Appx. 874 (11th Cir. 2012).

The contract never called for joint meetings. The section in Article 40-Miscellanous Clauses of the expired contract is captioned "New Employee Orientation," but the contract language only calls for the company and Union to hold a job orientation. Nothing in the language in this section suggests that the meetings must be held jointly in the presence of the employer and the Union. This is evident when Milewski credibly testified that management would conduct its own private meetings with the new hires. The contract language called for "The details surrounding said presentation will be discussed and resolved on a local basis…" The Respondent proffered no evidence of any local memorandum of understanding that was reached with the Union on conducting the meetings. I credit Milewski's testimony that the consistent practice for the past 12 years was to have private access to the new hires by both the Respondent and the Union. Consequently, the practice for the past 12 years of holding separate employer and union meetings with the new hires was the understanding between the parties.

This past practice changed in March when DiStefano instructed Clark-Muhammad to follow the letter of the expired contract (which did not specifically allow for joint meetings) and to insist on joint meetings. This change was also evident when McCutcheon told Milewski that she and another HR representative would insist on attending the Union's meeting with the new employees and told Milewski that this was the way it was going to be done in the future.

Accordingly, I find and conclude that the Respondent violated Section 8(a)(5) and (1) of the Act when it insisted on eliminating the past practice of the Union holding exclusive and private meetings with the new hires and insisted in having management representatives attend the union held-meetings with the new hires.[7]

4. The unilateral change to the work schedules of the B and R processors in June 2016 and in December 2016

The counsel for the General Counsel argues that the Respondent changed the work schedules of the B & R (Broken and Refused products) shifts in June 2016 and in December 2016, when it reverted to the schedules prior to the change without bargaining with the Union over the changes. The Respondent admitted that changes were made and that it did not provide notice or bargain over the changes with the Union.

Joe Bevacqua (Bevacqua), business unit leader since April 2016 was responsible at the time, for the daily operations of the supervisors and employee schedules at the distribution center and warehouse. Bevacqua noticed that the warehouse start times were staggered and varied with different job classifications. He stated that before the change, warehouse shifts were 6 a.m., 2 p.m., and 10 p.m. He stated that the rest of the production lines at the plant facility started at 7:30 a.m., 3:30 p.m., and 11:30 p.m. Bevacqua decided that all shifts should be consistent with a start time at 7 a.m., 3 p.m., and 11 p.m. He stated that he reviewed the applicable section in the CBA with other supervisors and discussed his planned changes with human resources.

Article 6, Section 2 of the expired contract (GC Exh. 3 at p. 11) states

> The Company will endeavor to keep the starting time of all employees as uniform as possible, consistent with the operation of the bakery and other locations covered by the Agreement.

Bevacqua admitted that there was no prior notice to the Union and no negotiations with the Union over the shift change. Bevacqua believed that this section of the contract was still in effect even though the contract had expired but maintained that his decision for the shift change was consistent and in compliance with the contract (Tr. 1154). Bevacqua testified that the shift schedule was changed in June/July and reverted to the previous schedule in about December.

Discussion and Analysis

The counsel for the General Counsel argues that the unilateral change in work hours of the B&R workers is a mandatory subject of bargaining. The Respondent maintains that its efforts to keep the shift times as uniform as possible is an equally plausible interpretation of article 28 (noted above) and that reverting the shift schedule to the original hours in December was also a

[7] The counsel for the Respondent also argued that the "change" was not material, substantial, and significant. I disagree and credit Milewski's testimony that having a management representative attend meetings held by the Union with the new hires had a chilling effect on soliciting contributions to the Union's political action activities and other union-related discussions (Tr. 69).

plausible interpretation of the article (R. Br. at 46, 47).

I find that the Respondent violated Section 8(a)(5) and (1) of the Act when it changed the shift of the B&R workers without notice and an opportunity to bargain with the Union. Clearly, the Board has consistently held that hours, including work schedules, are mandatory bargaining subjects. *Weston & Brooker Co*., 154 NLRB 747 (1965). In limited circumstances, the employer may institute changes in work hours without bargaining, such when it caused only minimal inconvenience to the employees. However, the Board has held that the unilateral extension of employees' breaks by 15 minutes was a substantial change in their working conditions in violation of Section 8(a)(5). *Setrafilm, Atlas Microfilming Div*., 267 NLRB 682 (1983).

The Respondent was obligated to maintain the status quo of the terms and conditions of employment after the expiration of the contract pending negotiation of a new contract. Where the parties are negotiating a collective-bargaining agreement, the employer has an obligation to refrain from implementing unilateral changes unless and until agreement or an overall impasse is reached. *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991). For the Respondent to assert that a reasonable interpretation of Article 6 would allow for changes in the workers' schedules is, by itself, a violation of the Act and therefore not a plausible interpretation of article 6.

Moreover, an employer is obligated to notify the employees' exclusive collective-bargaining representative and afford the representative an opportunity to bargain about the changes. Here, the Respondent did not notify and did not afford the Union an opportunity to bargain about the schedule changes.

Accordingly, I find that the Respondent violated Section 8(a)(5) and (1) of the Act when it unilaterally changed the B&R work schedules in June/July and December 2016 without notifying the Union of the change and affording it the opportunity to bargain over the changes.

5. The delay, failure and refusal in providing the Union's request for information

The complaint alleges that the Respondent unreasonably delayed, failed and refused to provide the Union with the information requested of (1) The names of any worker disciplined for violations of the Respondent's clock-in-clock-out policy from March 1, 2006, through March 1, 2016; and (2) The names of Respondent's new hires from June 2015 to the present (Tr. 10; GC Exh. 1; complaint at par. 31 (a) and (b)).

On March 28, the Union filed a grievance regarding the change in the Respondent's clock-in-clock-out policy that had resulted in the discipline of several workers (GC Exh. 12). On May 13, the Union made an information request for all discipline associated with clock-in-clock-out violations from March 1, 2006, through March 1, 2016. The information request to Clark-Muhammad asked that the information be provided no later than May 27 and/or that the Respondent provide an explanation as to what information was available, not in existence or denied (GC Exh. 13).

Milewski testified that the information request going back 10 years on any discipline regarding workers violating the clock-in-clock-out policy was needed in a grievance filed on this issue because he believed that the Respondent had recently amped-up discipline on workers not properly clocking in and out. Milewski believed that there were recent problems with the turnstile and/or the swipe cards that had resulted in the workers being disciplined (Tr. 221).

Milewski stated that some information on the disciplinary records was provided by the employer on September 9, 2016 (CP Exh. 1). There was also some additional follow-up information that the Respondent provided to the Union on January 5, 2017, regarding information on grievances filed on behalf of several workers (R. Exh. 3).

Milewski also testified that the Union made a request for information on new hires to the Respondent. On July 7, Milewski emailed Clark-Muhammad and requested contact information on all new hires from June 2015 to the present for the purpose of conducting his new employee orientation. Milewski explained that the Union had not been receiving a new hire list from the Respondent after the workers' first 30 days on the job as was the standard policy (GC Exh. 10). Milewski also wanted to ensure that union dues were properly being deducted for the new hires (Tr. 225−228).

In response, Clark-Muhammad forwarded Milewski's email on July 12 to Melissa Lochansky to prepare the information (GC Exh. 9). Milewski testified that he never received the new hire list. In contrast, the Respondent contends that Milewski received a list of all hires from January 1, 2014, to March 1, 2016, on May 24 and that a list of all employees hired in June and July 2016 was provided on September 2, 2016, to Milewski (Tr. 232−234; R. Exh. 4). The Respondent further argues that it provided the same information on the new hires to the Union a second time in January 2017 (R. Exh. 3; R. Br. at 48).

Applicable Legal Standards

The counsel for the General Counsel alleges that the information request for disciplinary records and for the new hire list was unreasonably delayed or not provided. The Respondent argues that the information request for the disciplinary records was an attempt at discovery in support of the Union's pending unfair labor practice charge on this same issue. The Respondent further argues that the list of new hires and disciplinary records were provided to Milewski.

It is well settled that an employer is obligated to furnish information requested by its employees' collective-bargaining agent that is relevant and necessary to the Union's bargaining responsibilities and contract negotiations. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979). The Respondent has a statutory obligation to provide the Union with requested information that is relevant and necessary to the Union's performance of its duties as collective-bargaining representative—including deciding whether to process grievances. *NLRB v. Acme Industrial Co.,* 385 U.S. 432, 435–436 (1967); *Centura Health St. Mary-Corwin Medical Ctr.*, 360 NLRB 689, 689 (2014). As to information regarding the unit employees, there is a presumption that the information is relevant to the Union's bargaining obligation. The burden is on the employer, once relevance is established, to provide an adequate explanation or valid defense to its failure to provide the information in a timely manner. *Woodland Clinic*, supra; *Coca-Cola Bottling Co.*, 311 NLRB 424, 425 (1993).

Discussion and Analysis

First, upon my review, I find that the information request for the disciplinary records of workers was reasonable, appropriate, and necessary for the Union in its capacity as the exclusive bargaining representative of unit employees. As credibly testified by Milewski, the disciplinary records of workers affected by this change in policy was information necessary to determine whether there was an increase in disciplining workers subsequent to the policy change as compared to employees disciplined prior to the policy change. I also credit Milewski's testimony that the Union appropriately requested information on a list of new hires to ascertain whether new hires were receiving their union orientation.

In my opinion, the information sought on the grievances is relevant. Had the information been provided to the Union at the start of the grievance process, the Union would have been in a better position to perform its duties as the collective-bargaining representative, including negotiating better settlement agreements for its employees. Without the information requested, the Union was at a disadvantage in not knowing if a less severe discipline would have been appropriate under similar situations prior to the clock-in-clock-out policy change.

Second, I find that the Respondent unreasonably delayed in providing the information request on the disciplinary records of workers under the previous clock-in-clock-out policy. The information request was made on May 13 to Clark-Muhammad (GC Exh. 13). The Respondent provided a partial response to the information request on the disciplinary records of workers on September 9 (CP Exh. 1) and provided more information on this request on January 5, 2017 (R. Exh. 3). Clark-Muhammad explained in her September 9 response that "…due to the burdensome requirement of having to manually search files for responsive records, it has taken the Company an unusually long amount of time to investigate these requests in order to respond" (CP Exh. 1).

The failure to timely provide the information requested is a separate 8(a)(5) violation of the Act. An employer must timely respond to a union's request seeking relevant information even when the employer believes it has grounds for not providing the information. *Regency Service Carts*, 345 NLRB 671, 673 (2005) ("When a union makes a request for relevant information, the employer has a duty to supply the information in a timely fashion or to adequately explain why the information will not be furnished"); *Kroger Co.*, 226 NLRB 512, 513–514 (1976). Absent evidence justifying an employer's delay in furnishing such information, such a delay is violative of the Act. In my opinion, I believe the Respondent is obligated to inform the Union as to the status in providing the information.

Here, the request on the disciplinary records was made on May 13 and the Respondent did not substantially comply with the request until January 5.[8] Clark-Muhammad indicated to Milewski on September 9 that the record compilation was time-consuming, but she never requested additional time to produce the documents or to inform the Union as to how much time she needed. Clark-Muhammad also failed to inform the Union whether her September 9 response was complete or was missing information.

In such circumstances, I conclude that Respondent did not make a good-faith effort to respond as promptly as circumstances allow and has violated Section 8(a)(5) and (1) of the Act by failing to respond in a timely manner. *Woodland Clinic*, 331 NLRB 735 (2000) (delay of 7 weeks unreasonable, absent explanation); *Bundy Corp*., 292 NLRB 671, 672 (1989) (delay of 2-1/2 months unreasonable, and explanation offered for delay inadequate); *Quality Engineered Products*, 267 NLRB 593, 598 (1983) (employer replied within 2 weeks, supplying some information, but did not supply rest of information required until 6 weeks later. No explanation given for "foot dragging" on request); *Pennco, Inc*., 212 NLRB 677, 678 (1974) (union made two requests on May 13 and 23. Information not supplied until June 29, a few days after the union filed amended charge with Region. Board concludes that delay was unreasonable and violative of 8(a)(5) of the Act); *Local 12 Engineers*, 237 NLRB 1556, 1558–1559 (1978) (information supplied 6 weeks after request, and only after charge filed with the Board); *International Credit Service*, 240 NLRB 715, 718 (1979) (unexplained delay of 6 weeks unreasonable). As such, I find that the delay was unjustified and that the Respondent never adequately explained if there was missing information or when more information would be forthcoming.

Third, I find that the information request for a list of new hires from June 2015 to the present was also necessary and reasonable for the Union to perform its duties as the exclusive representative of unit employees. The information request on the new hires is obviously relevant and necessary for contract negotiations and, therefore, a mandatory subject of bargaining. *Hen House Market No. 3*, 175 NLRB 596 (1969). It is a violation of 8(a)(5) and (1) of the Act when an employer fails or refuses to provide information requested for contract negotiations. *NLRB v. Truitt Mfg., Co.,* 351 U.S. 149 (1956).

The record shows that the Respondent never provided a complete list of new hires as requested by the Union on July 7. Milewski requested the list of new hires from June 2015 to the present. On July 12, Clark-Muhammad forwarded Milewski's information request to Melissa Lochansky and requested that she prepare the list for Milewski. On September 8, Milewski repeated his request to Clark-Muhammad by attaching his initial request for the information from July 7 (GC Exh. 9). There is nothing in the record to show that Milewski's September 8 reaffirmation of his request was acknowledged or followed-up by Clark-Muhammad.

The counsel for the General Counsel argued that the information was never received by the Union and there is no evidence to the contrary (GC Br. at 17). The counsel for the Respondent argued that Milewski received a list of all hires from January 1, 2014, to March 1, 2016, on April 12, 2016 (R. Exh. 4) and all new hires from June and July 2016 were produced on September 2. In addition, Respondent contends that it provided the same

[8] I would conclude that the January submission of documents by the Respondent fully complied with the information request for the disciplinary records. Milewski testified that the Union did not assert that the Respondent's production of documents was incomplete after January (Tr. 224).

information to the Union in January 2017 (R. Exh. 3).

Contrary to the Respondent's arguments, I agree with the General Counsel to the extent that the Respondent never provided a complete record of the new hires from June 2015 to the present. I find that the record shows that Clark-Muhammad sent an email to Milewski and Vlashi on March 24 of a list of new hires as of January 2014 (R. Exh. 4). This was, at most, a partial list of new hires through the beginning of 2014. In subsequent emails, Clark-Muhammad continued to add other items to her list that were not included in her March 24 response, such as her email of April 12 to include the addresses of workers that the Union had requested (R. Exh. 4 at 5); a list of addresses and phone numbers of new hires in her April 13 email (R. Exh. 4 at 14); and an updated address list of new hires for June (R. Exh. 4 at 28). However, nowhere in the record is there a document showing a full list of new hires from June 2015 to the present. The Respondent argues that the full list of new hires was provided a second time to the Union in January 2017 (R. Br. at 48). However, the HR manager did not attach that list in her January response, she merely stated that "…the request for info. on new employees sent to you on 7-7-16" (R. Exh. 3 at 2). As noted above, no such list existed as of July 7 because Clark-Muhammad was still attempting to provide the list of new hires to Milewski as of July 12 and Milewski had again made his request for the same information on September 8 with nothing in the record showing that the Respondent had subsequently acknowledged or responded to his repeated requests.

Further, I find nothing to support the Respondent's argument that the information request for disciplinary records and for the new hire list was an attempt by the Union at discovery. The information request for the disciplinary records made on May 13 was made pursuant to a grievance filed on March 28 that alleged the Respondent made a unilateral change in the clock-in-clock-out policy without notifying and bargaining with the Union (GC Exh. 12). The charge alleged that the Respondent failed and refused to provide the Union with an information request of workers disciplined by the new clock-in-clock-out policy. This charge was filed with the NLRB on June 23, 2016 (GC Exh. 1g). Consequently, the information request pre-dated the NLRB charge. There could not have been "discovery" on the NLRB charge since the charge was not filed until more than a month later.

I also find merit in the argument by the counsel for the General Counsel that the charge filed on June 23 regarding the alleged unilateral change in the clock-in-clock-out policy was subsequently withdrawn by the Union and approved by the Regional Director, and as such, it is nonsensical for the Respondent to argue that the information request was for discovery of a charge that no longer existed (GC Exh. 1x). I would also note that Clark-Muhammad had raised certain objections to Milewski and the Union on September 9 on this information request, but she never asserted that the information request was an attempt at discovery by the Union for an NLRB charge (CP Exh. 1).

The Respondent also contends that the information request for the new hire list was an attempt at discovery for an NLRB charge filed on June 14 by the Union (GC Exh. 1c; R. Br. at 48). I find no merit for this argument.

The information request for the new hire list was made by Milewski on July 7 (GC Exh. 9). The NLRB charge filed by the Union on June 14 (as cited by the Respondent in GC Exh. 1c) alleges, among other items, the unilateral refusal to deduct union dues from new employees' pay. Milewski's rationale for the information request on July 7 for the new hire list was

> In order to have a new employee orientation with the new hires I am requesting that the company provide me contract information on all new employees hired from June 2015 to present with their names, addresses, and phone numbers, etc.

While Milewski did indicate in his testimony that the new employee hire list could be used to determine whether union dues were being deducted, the specific reason cited in his information request on July 7 was to ensure that new hires received orientation from the Union. The Union may have been motivated by several factors in making this request, but clearly, the Union's primary focus was to ensure that new hires receive their union orientation, especially in light of the fact that the Respondent had just denied the Union in May, the opportunity to conduct separate meetings with the new hires. This request for information on new hires was for the purpose of ensuring they receive union orientation and not expressly for "discovery" on the Respondent's unilateral refusal to deduct union dues.

Accordingly, I find that the Respondent violated Section 8(a)(5) and (1) when it unreasonably delayed or failed and refused to provide the information requested by the Union.

6. In and after May 2016, the Respondent failed to continue in effect all the terms and conditions of the collective-bargaining agreement by ceasing to honor employee authorizations for dues deductions

Milewski testified that at a May 2016 union orientation meeting, the Union collected dues authorization cards and the cards were subsequently provided to the Respondent (Tr. 70−76; GC Exh. 7). It is not disputed that the dues of the new hires were collected by the Respondent (GC Exh. 8). The counsel for the General Counsel alleges that the Respondent did not remit the collected dues to the Union until November and still had not received all the collected dues at the time of this hearing (Tr. 74, 237).

The Respondent argues that the dues were collected for over 2 years and that it did not unilaterally fail to continue deducting union dues for new employees after the expiration of the contract. Milewski testified that the Union received the collected dues from the May 2016 orientation meeting except for a couple of instances (Tr. 237, 242). Milewski also admitted that there have been clerical errors in the past regarding outstanding dues not yet received by the Union that may account for other potentially missing dues from employees (Tr. 238).

It is clear under article 3 at p. 6 of the expired contract (GC Exh. 3), the Respondent has a contractual obligation to remit dues to the Union. Under *Lincoln Lutheran of Racine*, 362 NLRB 1655 (2015), the Board has held that employers could not unilaterally end dues check-off at the expiration of a collective-bargaining agreement. The Respondent argues that the Administrative Law Judge should reconsider this holding when the Board overturned 50 years of precedential history under *Bethlehem Steel Co.*, 136 NLRB 1500 (1962) (R. Br. at 50−52).

Upon my review, I find it unnecessary to address whether an employer has a legal obligation to continue remitting union dues after the expiration of the contract. Here, the complaint alleges that the Respondent ceased to honor new employee authorizations for dues deductions. I find that the Respondent continued to honor new employee authorizations for dues deductions. To be clear, the complaint did not allege that the Respondent refused to remit or timely remit the collected union dues.

The record shows that the Respondent continued to deduct dues of new employees from the May 2016 union orientation. While there were some delays in the remittance of the dues to the Union, Milewski clearly testified that he had received all the dues from that orientation by November, except for "a couple" and he surmised that mistakes could be possible since there had been clerical errors in the past when dealing with dues deductions of over 500 workers (Tr. 240). As such, the Respondent never stopped collecting dues deductions from the May union orientation and had remitted most if not all of the dues to the Union by November.

Accordingly, I find that the Respondent did not violate Section 8(d) of the Act when it allegedly ceased to honor employee authorizations for dues deduction. I recommend that this allegation in the complaint be dismissed.

### The Alleged Discharges and Discipline in Violation of Section 8(a)(3) of the Act

The counsel for the General Counsel alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by suspending and discharging Nafis Vlashi (Vlashi), Bruce Scherer (Scherer), and Claudio Gutierrez (Gutierrez) because they engaged in union or protected concerted activity (GC Br. at 18). The counsel for the Respondent argues the three employees were discharged for falsifying company records, leaving the work area without authorization, taking excessive breaks and/or using the time badge of another employee or permitting another employee to use their time badge (R. Br. at 2, 31).

#### 1. The analysis of overtime usages by Rogelio Melgar

Rogelio Melgar (Melgar) testified he held the position of senior supply planning manager at the Respondent's East Hanover, New Jersey facility starting in March 2018. Prior to that time, Melgar was the continuous improvement manager from January 2017 to March 2018 at the Fair Lawn plant. Melgar was previously employed with the Respondent in Australia as a continuous improvement engineer from 2015 until his reassignment to the Fair Lawn Plant in January 2017.

Melgar said his responsibilities were to maximize production output on the line and to ensure a smooth processing of operations in the systems. When Melgar arrived at the Fair Lawn plant, he was surprised to see labor costs, in particular the overtime costs, to be disparately different to what he had observed in other factories within the production network in North America. Melgar testified that overtime at the Fair Lawn plant was around 36 or 37 percent whereas other factories had overtime in the single digits (Tr. 806). Melgar testified he did a "Timestamps" study in April/May 2016 with data starting from September 2015 to understand the productivity of the plant.

Melgar said he was concerned that excessive overtime was affecting productivity and safety. Melgar deemed that working over 80−100 hours per week adversely affects cost, safety of the workers, production output, and job performance. Melgar brought his concerns about overtime hours to Plant Manager Kuratli in fall 2015. Kuratli instructed Melgar to give overtime a closer inspection. Melgar began by reviewing how manual punch-outs correlate with overtime hours. Melgar defined a punch-out as when a worker leaves the facility without punching out and the payroll record is adjusted manually by the supervisor.

Melgar discovered that high manual punch-outs correlated directly with high overtime hours accrued by the workers. Melgar reached this conclusion by analyzing the payroll records with the turnstile records of facility entries of the workers. Melgar also reviewed the available video records from the security system of workers entering and exiting the plant.

Melgar thought that overtime hours could be reduced if only one supervisor was in charge of the manual punch outs. In November/December 2015, Supervisor Nick Giulianelli was designated as the only supervisor who would be doing the manual punch-outs. However, Melgar discovered that there was no reduction in the number of overtime hours and decided to delve deeper into the issue in May 2016.

Melgar prepared a "Timestamps Summary" data report (GC Exh. 19), wherein he selected 16 random weeks from October 2015 and May 2016. His report looked at three factors. The first factor was the number of times a worker goes in and out of the facility per each day worked. He said this would give him a total measure of elapsed time (work time) in the facility. He looked at payroll patterns of 59 workers as a second factor. Melgar said he selected 59 employees with in excess of 80 hours of overtime per week in the 16 random weeks. Finally, he reviewed for any discrepancies between the entries and exits records on the turnstile and the payroll records of the employees as the third factor. He would record that number of entries and exits of each employee or would notice if there were multiple exits but no entries by the same worker (Tr. 813).

Melgar gave an example of how he used the three factors with a worker named Zoran Naumoski (Naumoski) with high hours worked per week. Naumoski had entered and exited the plant almost 6 times per day during his work shift during a 51-day period. Melgar rated Naumoski as a worker with the highest number of turnstile entries for the number of workdays. Melgar testified that Naumoski was out of the facility for over 90 minutes on October 13, 2015 and out almost 60 minutes on October 14 while on a work shift (Tr. 853).[9] Melgar concluded that Naumoski was on extended and unauthorized breaks when he should have been working.

A snapshot of the "Ratio of Turnstile Entries and Days Worked" in the Timestamps Summary report (GC Exh. 19 at 3) shows the first 21 out of 59 workers with the highest turnstile entries (either arriving or leaving the plant) in the given 16 weeks as complied by Melgar:

[9] Naumoski retired before any discipline was taken against him.

| | Ins | Outs | Days W | Average |
|---|---|---|---|---|
| NAUMOSKI, ZORAN | 353 | 342 | 51 | 6.67 |
| STITH, JORY | 570 | 528 | 85 | 6.46 |
| HADZI, SEMIN | 598 | 587 | 93 | 6.07 |
| JACOBS, TOMMY | 167 | 666 | 73 | 5.71 |
| MOODY, JOHN | 335 | 339 | 83 | 4.06 |
| VLASHI, NAFIS | 391 | 339 | 97 | 3.76 |
| SMITH, RICHARD | 305 | 308 | 97 | 3.16 |
| POINTER, DONALD | 261 | 257 | 93 | 2.78 |
| BROWN, ANDRE | 213 | 223 | 82 | 2.66 |
| COLUCCI, JUSTIN | 244 | 240 | 94 | 2.57 |
| SIMPSON, HARVEY | 140 | 148 | 64 | 2.25 |
| SMITH, MICHAEL | 205 | 202 | 98 | 2.08 |
| SCHERER, BRUCE | 169 | 171 | 84 | 2.02 |
| GARCIA, JOSE | 200 | 193 | 102 | 1.93 |
| STOSIC, NINO | 163 | 158 | 87 | 1.84 |
| MORRIS, MICHAEL | 160 | 152 | 86 | 1.81 |
| RENDON, JAVIER | 144 | 140 | 84 | 1.69 |
| Dominguez, Eldo | 125 | 122 | 74 | 1.67 |
| AARONS, JERROME | 101 | 101 | 63 | 1.60 |
| MANEVSKA, VALENTINA | 131 | 131 | 85 | 1.54 |
| KOROSKOSKI, NOVE | 152 | 148 | 98 | 1.53 |

Naumoski had the highest ratio, followed by Jory Stith, Semin Hadzi, Tommy Jacobs, John Moody, and then Nafis Vlashi.[10] Vlashi had an average of 3.76 turnstile entries during the random 16-week period. There were 6 more workers with the highest ratio before reaching Bruce Scherer. Scherer had an average 2.02 for the same period. Claudio Gutierrez is not listed as one of the 59 workers with a high turnstile ratio.

Melgar tabulated the 59 workers with the highest 80+ over time hours during the random 16-week periods (GC Exh. 19 at 4). The following is a list of the 13 workers with the highest 80+ over time hours:

# Overtime patterns.

| Personnel Number | Employee Name (Last, First) | 40 | 41 | 42 | 46 | 47 | 59 | 2 | 3 | 5 | 11 | 14 | 16 | 17 | 18 | 20 | 21 | Number of weeks above 80 hrs. |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 50025678 | Colucci, Justin | | | 101 | 87 | 80 | 104 | 97 | 88 | 92 | 84 | 88 | 88 | | | | | 10 |
| 59033735 | Smith, Richard | 98 | 88 | 99 | | 92 | 88 | 99 | 90 | | | 95 | | 81 | | | | 9 |
| 59039417 | Vlashi, Nafis | 104 | 103 | 88 | 102 | | 96 | | | | | 89 | | | | 85 | | 7 |
| 59039597 | Moser, Paul | 115 | 101 | 80 | 88 | | 101 | | | 81 | | | | | | | 93 | 7 |
| 59039539 | Pointer, Donald | 92 | 96 | 90 | 93 | 92 | 92 | | | | | | | | | | | 6 |
| 59039531 | Jacobs, Tommy | | | | | | 87 | | | | 93 | 90 | 80 | 93 | | | 92 | 6 |
| 59039372 | Barnes, Michelle | | | 112 | | 80 | | | 90 | | 87 | | | | | | | 3 |
| 59039527 | Madejewski, Jozsy | 82 | 87 | | 94 | | | 81 | 83 | | | | | | | | | 5 |
| 59039744 | Matario, Marcellao | 81 | 101 | | 88 | 99 | 88 | | | | | | | | | | | 5 |
| 50025539 | Lemeuble, Ricardo | | | 87 | | 87 | 85 | 80 | | | | | | | | | | 5 |
| 59039362 | Porpolino, Egidio | | | | 100 | 93 | 100 | | | 88 | | | | | | | | 4 |
| 59039411 | Papolicio, Bruce | | | | 80 | 81 | 84 | | 84 | | | | | | | | | 4 |
| 59039581 | Koroskoski, Nove | | | 85 | 81 | | | 80 | | | | | | | | | | 4 |

Nafis Vlashi was the third highest, but neither Scherer nor Gutierrez were on this list of workers with 80+ hours of work in a given week. Melgar insisted that the stated purpose of his data review was to understand the true nature of overtime use and which positions were driving most of the overtime activity. Melgar admittedly never completed his data review and had only reviewed the discrepancies of four workers, Nafis Vlashi, Bruce Scherer, Nove Koroskoski, and Claudio Gutierrez, of the 59 employees (Tr. 899; CP Exh. 20 at p. 12).

2. The discharge of Claudio Gutierrez

Claudio Gutierrez (Gutierrez) was suspended and discharged after Melgar reviewed the overtime hours worked by another employee named Nove Koroskoski (Koroskoski). Melgar explained that Koroskoski was reviewed because he averaged 1.53 turnstile entries on days worked and was one of the workers with 80+ overtime hours in a 4-week period out of the 16-week period (noted in the above "Overtime Pattern chart) (Tr. 860). In his review, Melgar noticed on May 6 that Koroskoski had a turnstile entry record but no record of a departure. Melgar said that Koroskoski had clocked out at 11:30 p.m., but had no turnstile departure for that day. The only turnstile entry for a departure around 11:30 p.m. was recorded by Gutierrez. There was no turnstile exit recorded for Koroskoski. Melgar stated that the video security camera at the turnstile showed Koroskoski leaving the plant. Melgar could not understand how he left the facility when there was no turnstile swipe record of Koroskoski leaving the plant. Melgar concluded that Koroskoski clocked out using his own card, clocked Gutierrez out for the day with Gutierrez' badge, and then swiped the turnstile using Gutierrez' badge at around 11:30 p.m. to leave the plant. Both Koroskoski and Gutierrez were on overtime hours on May 6.

The screen shot of the security camera video shows Koroskoski departed at 11:30 p.m. but the turnstile record reflected only Gutierrez' card (GC Exh. 13 at 9).

Melgar admitted that Gutierrez ended up as collateral damage because Gutierrez did not have 80 hours of overtime and was only discovered when Melgar was looking for manual punch outs for Koroskoski who was one of the 80+ overtime hour workers. Melgar concluded that

> My conclusion is that Mr. Nove (Koroskoski), he used

[10] Tommy Jacobs' position as a forklift operator required him to have multiple entries and exits during his work shift.

> Claudio's (Gutierrez) card to punch Claudio out of the payroll system. And accidently, the turnstile system picked up this mistake at Nove's exit. As well as, there is no record of Claudio leaving. So, which it means that Claudio left somewhere before 11:30. And as -- and somehow, like, gave the card to Nove (to use) (Tr. 825).

Gutierrez started working for the Respondent in 1990 as a floor help and was discharged on July 1. Gutierrez worked the second shift 3:30 p.m.-11:30 p.m. and was supervised by Jerry Luchansky. Gutierrez also held the position of shop steward for the past 20 years. Gutierrez was involved in arranging the union rallies, although he did not participate in them. Gutierrez was also present when Shift Supervisor, Dan Calibrese, told him, Vlashi and Scherer to take down the flag in front of the locker room and with the union logo T-shirt incident in April/May when the plant manager told them to return the shirts.

Gutierrez was also involved in another incident involving utility workers in March 2016. He told management that the workers could not cross crafts because they were not qualified to do the work of the floor help. He was told by Shift Manager Dan Calibrese to leave them there because the Union did not have a contract. Gutierrez heard similar remarks made by the HR Supervisor, Dawn Sprague, in March/April 2016 telling workers that they did not have a contract and if they don't do what is told, they will be fired. Gutierrez replied that the Union still has a contract to work under the old contract. As noted above, Gutierrez was involved as the union representative when a returning worker from short-term disability in April 2016 was not permitted to work by Clark-Muhammad.

On a routine basis, Gutierrez is on official union business to prepare the schedules for the overtime workers on the weekends and any overtime work needed on a daily basis. Gutierrez stated that a supervisor would inform him as to the need for overtime workers. In addition to his work on union business with the scheduling of overtime, Gutierrez also ensures that the workers receive their fair share of overtime and that workers are not instructed to cross crafts to perform work for the Respondent. Gutierrez was involved in the January 2016 incident when the Respondent attempted to hire a subcontractor to perform work on the weekend. Gutierrez complained that there may not have been enough workers to perform overtime work on Saturday, but they could have worked on Sunday. According to Gutierrez, the Respondent brought in a contractor to work on Saturday. Gutierrez testified that he informed the management and safety coordinator, John Lissi and, in turn, Lissi told the contractor to stop working because they were not trained to clean the equipment.

Gutierrez was summoned by Clark-Muhammad on June 15 to her office. Present at the meeting were Clark-Muhammad, a corporate security officer, later identified as Mike Keenan, the Respondent's security director for North America, and a shop steward. Gutierrez was told by Clark-Muhammad that he falsified timecards by having another worker punch his timecard. He was also charged with falsifying medical records. Gutierrez admitted to her that someone used his timecard to get out of the plant because of a problem with the turnstile on May 6.

Gutierrez recalled being told by Clark-Muhammad that he clocked in at 8:41a.m. and never clocked out. Gutierrez replied that he was on overtime and a supervisor would manually clock a worker in and out when on overtime. Gutierrez testified that since he worked the 3:30 p.m. shift as his routine shift, he was on overtime at 8:41 a.m. and a supervisor would have manually clocked him out of overtime and a supervisor would have clocked him in for his regular shift (Tr. 723).

Gutierrez recalled being told by Clark-Muhammad that someone used his timecard to clock him out and to swipe the turnstile on May 6. Gutierrez stated that he left the plant and never came back and another worker, Leon (Nove) Koroskoski, punched him out for the day. According to Gutierrez, he was outside the plant at that time to solicit employees to work overtime. Gutierrez stated that he finished the union work and left to go to a drug store while still on union time. By that time, Gutierrez realized he forgot his wallet and called Koroskoski to retrieve it for him. He said that his wallet contained his ID badge for clocking out and for swiping the turnstile. He instructed Nove to bring down his wallet so that he could go back in to punch out, but Nove did not do that (Tr. 689−692; 724−730). Instead, Koroskoski clocked Gutierrez out at the end of the shift and used his badge to swipe himself out. Gutierrez stated this had never happened before. Gutierrez denied that he instructed Koroskoski to clock him out or to use his badge to swipe the turnstile.

Gutierrez was suspended after his interview with Clark-Muhammad and discharged on July 1 (CP Exh. 8). Gutierrez was charged with

> -Falsifying, making material omissions from or tampering with any Company records, this includes obtaining employment based on false or misleading information; falsifying medical records, time records, product records, quality records, etc.
> -Leaving the work area without authorization.

Gutierrez stated that there is progressive discipline and he should not have been discharged since he only had one prior infraction for which he received a warning for walking around the plant with a cup of coffee, more than 7 years ago, another warning and an absenteeism infraction prior to 2009 that he received counseling.[11]

3. The discharge of Bruce Scherer

Melgar also review the turnstile entries and overtime hours of employee Bruce Scherer (Scherer). Melgar testified that Scherer had consecutive exits with no corresponding entries into the plant on May 5 and 6. Melgar reviewed the security video on those dates and noticed that Scherer bypassed the turnstile on May 5 at 5:36 p.m. and there was no turnstile record that he returned to the plant. Scherer then reportedly departed the plant at 11:31 p.m. Melgar testified that on May 6, Scherer had two exits at 2:57 p.m. and at 7:11 p.m. with no entries back to the plant. The assumption was that Scherer returned to work at a time after 2:57 p.m. and then left the plant again at 7:11 p.m. Melgar concluded that Scherer intended to hide the fact that he was actually outside the building for the entire time from 2:57 p.m. until 7:11

[11] The discharge of Leon Koroskoski for violating the Act was not an allegation in the complaint. Koroskoski did not testify as to his knowledge regarding Gutierrez' discharge.

p.m. when he should have been working. Melgar determined that Scherer had 4 hours of unaccounted time between 2:57 p.m. and 7:11 p.m. (Tr. 856−859).

Melgar believed his assumption was correct about Scherer after he reviewed a security camera screen shot that showed Scherer squeezing between the turnstile bar and the wall in order to bypass the turnstile and not use his card to enter the plant on May 5 (GC Exh. 13 at p. 36).

Bruce Scherer (Scherer) testified that he had over 31 years of employment with the Respondent and 20−25 years as a shop steward. Scherer also held several union positions for over 20 years, including union delegate, executive board member, and served on bargaining committees for national contracts. Scherer served as a shop steward at the time of his termination.

At the time of his discharge, Scherer was an icing mixer on the 3:30−11:30 p.m. shift and supervised by Jerry Lochansky. Scherer was suspended on June 15 and discharged on July 1. Scherer stated he had no prior discipline except for one infraction "years ago" that he thought was expunged from his personnel record (Tr. 557).

Scherer described several incidents prior to his termination that the counsel for the General Counsel alleged demonstrated the Respondent's antiunion animus. Scherer had argued with his supervisor over the Respondent's attempt to bring a subcontractor in on Saturday when employees could have worked an overtime shift. Scherer testified that he complained with Claudio Gutierrez and Nafis Vlashi to Supervisor Marco Lucci that the Union had qualified employees to work on the Saturday shift. Eventually, the site safety coordinator (John Lissi) was called and Supervisor Lucci was informed that the outside contractor was not qualified to perform the Saturday clean-up work. Scherer believed that the Respondent was upset and complained to him the following Monday that the Union had kicked out the contractor. Scherer replied that it was not the Union because Lissi had agreed that the contractor was not qualified to perform the clean-up work. Scherer stated this to HR Representative Dawn Sprague and Supervisor John Laten (Laten). Sprague replied that the Union did not have a contract, implying that the contractor should have been permitted to work.

Scherer described a second incident in February 2016 when the Respondent instituted a new bakery line. Scherer believed that it was instituted to reduce overtime work. Scherer complained that the Respondent instructed workers to cross crafts to perform duties in other workers' job classification. In this instance, Scherer testified that the Respondent was using utility workers to perform floor help and line attendant classification work. Scherer said this was an ongoing problem and he had confronted Supervisors Laten and Henry Trumpataz over this crossover classification work. Scherer also spoke to Supervisor Dan Calibrese over the use of workers in the packing department to work at another department (Tr. 566).

Scherer was also involved in the T-shirt with the union logo incident and was instructed by Kuratli, in the presence of Clark-Muhammad, to remove his union logo T-shirt (Tr. 594). Scherer stated that other workers were also told to return their T-shirts. Scherer said that the T-shirts were company property, but the shirts are the workers' own to maintain and he instructed the workers not to take them off. Scherer was also involved in the incident with the American flag that he and other union members had wanted to put up near the employees' locker room but was told by Kuratli to take the flag down (CP Exh. 18).

Scherer's union position also allows him to have designated days to complete union business, usually full time on Wednesdays and Thursdays and, on occasions, Fridays. Scherer's time clock ins and outs would reflect his union time worked. While on union business, Scherer would not be performing his routine work duties. Scherer described that he would deal with Clark-Muhammad while on union business in areas such as when the workers being forced to arrive to work 15 minutes earlier than their scheduled time without paying them on penalty of discipline. Scherer would also assist workers when they are suspended or otherwise disciplined. During the disciplinary interview, as the shop steward, Scherer would routinely receive a form 101, which is a form used by the Respondent and provided to the charged worker that described the reason and the facts for the disciplinary action (See, CP Exh. 15 for examples of the form).

Scherer testified that he was called to Clark-Muhammad's office on June 15 at 2:30 p.m. by Supervisor Gordon Cordasco. Scherer said that the supervisor did not present him with a form 101. Scherer stated that an alternate shop steward was present in Clark-Muhammad's office. Scherer also noted that an unidentified individual was also present, who he discovered later as the Security Director Keenan. Scherer was interrogated about his whereabouts on May 5 and 6 and questioned by Clark-Muhammad about his punch ins and outs. Scherer explained that a supervisor would manually punch him in if he was working overtime and punch him out when overtime is completed. Scherer also recalled that Clark-Muhammad asked if he had used anyone else's badge to clock in or out. Scherer denied using another worker's badge.[12]

Scherer stated that his interview lasted from 5−10 minutes (Tr. 569–577). Scherer stated that he never received a signed copy of the interview. Scherer was immediately suspended after his interview and was discharged, effective July 1 (CP Exh. 7). Scherer was charged with

> -Falsifying, making material omissions from or tampering with any Company records, this includes obtaining employment based on false or misleading information; falsifying medical records, time records, product records, quality records, etc.
> -Leaving the work area without authorization.

Scherer was not shown any photographs or records by Clark-Muhammad to support his discharge. Scherer was told by her that he manually punched in on May 5 at 7:18 but there were no recorded photographs of him going through the turnstile. Scherer was also accused of back-to-back departures at 5:36 p.m. and 11:31 p.m. with no corresponding turnstile records of him returning to the plant before the 11:31 p.m. departure. For May 6, Scherer was told he had no departures recorded at the turnstile for 2:57 and 7:11 p.m. (second shift).

Scherer stated that he was scheduled for union business on

[12] Scherer was never charged with using someone else's ID card.

May 5 and 6 (GC Exh. 17; Tr. 617) and would attend to his union activities throughout the plant, including the outside areas where there are picnic tables to talk with the workers. Scherer stated that he would clock in when he arrives to work and when he leaves at the end of his workday, but would also use his badge to swipe the turnstile on various occasions to get coffee, take a break or to talk with employees about overtime work when they are outside the plant. Scherer stated that it is rare that workers are terminated for thief of time, maybe only given a warning and only after numerous warnings and write-ups before a suspension would be issue (Tr. 581).

Scherer admitted that, on occasions, he could not swipe in or out when he forgot his badge while on his breaks or to escort workers to the plant. Scherer testified he would usually notify a supervisor, including the safety site coordinator when he does not have his badge. Scherer said he does not sign a security logbook when he walks in or out without his badge. Scherer also stated that there are occasions that the turnstiles did not work even when he has a badge. On the occasions that he fails to take his badge, Scherer admittedly would walk around the turnstiles bar through a space that is not blocked by the bar or through the disability entrance and wave to the security guard (Tr. 591; CP Exh. 12 at p. 7).

On cross-examination, Scherer admitted to bypassing the turnstile but was not certain whether it was on May 5 or May 6 at 7:45 p.m. Scherer stated that Clark-Muhammad did not give him an opportunity to respond to the reason for bypassing the turnstile (Tr. 618). At the hearing, Scherer testified that the turnstile not working on that day (Tr. 626). Scherer stated that he never informed Clark-Muhammad that he was on union business during the interview because Scherer was not certain as to what weekdays were May 5 and 6. At the hearing, Scherer testified that he was on union business on both days when he had the opportunity to look at his time schedule after his interview.

There was no documented evidence at the hearing to show that Scherer had any prior recent disciplinary action against him.

4. The discharge of Nafis Vlashi

Melgar also reviewed the overtime hours and the ratio of turnstile entries and days worked for Nafis Vlashi (Vlashi) for September 28, 29, November 18, 2015, May 5, 6, and 12, 2016.

On September 28, Melgar discovered 2 consecutive entries for Vlashi. Melgar said that the 2 consecutive entries were within seconds of each other. He noted a 3:09:30 exit (leaving the plant) and then a second one at 3:09.37 in (returning to the plant). Melgar also noted an entry entering the plant at 5:42 p.m. Melgar found it strange that Vlashi would have two "ins" at 3:09 and 5:42 without an exit from the plant. Melgar concluded that Vlashi had swiped out at 3:09:30 and then swiped back in at 3:09:37, but he was actually not returning to work and was outside the facility doing nonwork activities and did not swipe into the plant until almost 3 hours later at 5:42 p.m. Melgar stated that Vlashi was missing from work for a total of 4 hours on September 28.

Melgar said there was a similar pattern with Vlashi's turnstile entries for September 29. He testified that Vlashi left the plant with an entry at 9:50:51 a.m. and swiped in at 9:50:55 a.m. Melgar said that Vlashi did not swipe back in until 55 minutes later. This pattern occurred two more times on September 29. Melgar said that Vlashi swiped out at 4:51 p.m. but swiped in 3 seconds later but did not actually work until he swiped in 48 minutes later. A third incident occurred when Vlashi did not swipe into the plant until 7:40 p.m. Melgar stated that Vlashi was missing from work for a total of 150 minutes on September 29 (Tr. 830).

On November 18, Melgar stated that Vlashi was seen on the security camera going through the turnstile at 11:52:07 by swiping out and then swiping back in. Melgar testified his suspicions were confirmed that Vlashi would take extended breaks by swiping his card a few seconds later as if he had returned to work. Melgar stated that Vlashi did not swipe back into the plant (to work) until 12:47:38 p.m. on November 18 (GC Exh. 13 at 18).

Melgar testified that May 5, 2016, Vlashi exited the plant at 11:55 a.m. and returned at 12:52 p.m. However, the turnstile entries show that Vlashi had a second return to the plant at 7:45 p.m. but there was no entry that he had left the plant after 12:52 p.m. The entries also reflect that Vlashi finally left work on May 5 at 9:22 p.m. but was manually punched-out at 11:30 p.m., giving him a total of 25 percent additional overtime while he was actually absent from work (Tr. 843, 844).

Melgar again discovered a pattern of attendance abuse by Vlashi on May 6. Melgar said that Vlashi had turnstile entries showing several quick exits and returns while he was supposed to be working on overtime. Melgar noted that Vlashi arrived at work at 7:29:30 a.m. and exited out at 3:10 p.m., returned to work at 3:15 and departed at 3:32 p.m., returned to the plant at 3:37 p.m. and then out by 3:43 p.m., then returned to work at 7:25 p.m. and exits again at 10:04 p.m. Vlashi returns to work at 11:17 p.m. in order to clock out for the day at 11:30:31 p.m. (Tr. 845−846).

Melgar stated that Vlashi was absent from work for 5 hours even though he was paid for those 5 hours on May 12. Melgar stated that Vlashi arrived to work at 7:24:24 a.m. (GC Exh. 13 at 21) and an exit by Vlashi at 12:34 p.m. Vlashi did not return until 1:27 pm. Vlashi then exited the plant at 3:30 p.m. and returns at 6:21 p.m. and left at 6:53 p.m. and did not return to the plant until 11:11 p.m. and then finally clocking out for the night at 11:30 p.m. Melgar concluded that Vlashi was absent for 5 hours during his shift and stated that he only returned to the facility 18 minutes before the end of the shift to punch out (Tr. 851).

Melgar also reviewed Vlashi's work hours for the following week and discovered two entries by Vlashi at 6:19 p.m. and 8:55 p.m. on May 21 but Vlashi had no exits recorded during the time he was on overtime. Melgar also noted that on May 22, Vlashi was recorded as having exited the plant at 2:31 p.m. and not returning until 6:06 p.m. Melgar concluded that Vlashi had unaccounted time while on overtime from 2:31 p.m. to 6:06 p.m. (Tr. 873).

Vlashi was employed by the Respondent from 1994 until discharged on July 1. At the time of his employment, Vlashi worked from Monday to Friday on the 7:30 a.m.−3:30 p.m. shift. He would often have overtime hours on the weekends from 3:30−11:30 p.m. Vlashi was also president of Union Local 719 since 2016 and was the shop steward for the packing and floor departments for the past 8 years. Vlashi was involved in the union campaign to negotiate a new contract and coordinated and

spoke at the union rallies in front of the plant on April 25, 26, May 9, and 12. Vlashi also posted on Facebook pictures of the union workers wearing the union logo T-shirts that the supervisor demanded they remove (CP Exh. 17).

Vlashi testified that he was on official union time Tuesday, Wednesday, and Thursday, but may be engaged in union business at any time. Vlashi was responsible for scheduling the overtime hours for the workers on all three shifts on behalf of the Respondent. While on union time, he could be working in different areas of the plant or even outside of the plant if he was looking for a worker or supervisor. Aside from his 3 days of union business in scheduling the overtime for the workers, Vlashi, as a steward, also dealt with supervisors on potential grievances and discipline of the workers.

Vlashi testified that he was involved in the January 2016 incident when the Respondent attempted to bring in a subcontractor for a weekend shift instead of using the regular workers. Vlashi said he was informed by Scherer and Gutierrez that the subcontractor was not qualified in safety to clean the lines. Vlashi testified he met with Supervisor Marco Lucci, who had refused to listen, and he then elevated the issue to John Lissi, the safety coordinator. According to Vlashi, Lissi informed Lucci that the subcontractor could not perform the work because of safety issues. Vlashi said he was involved in a similar incident in February 2016, when the Respondent placed workers in the utility classification to perform floor help work. Vlashi said he demanded that Supervisor Dan Calibrese remove the utility workers.

Vlashi also testified to antiunion animus when Supervisor John Laten informed the packaging department workers in March 2016 that they had no contract and also recalled Supervisor Mike Goodin telling the same to the mixing department workers during the April/May time frame.

Vlashi was summoned by Clark-Muhammad on June 15. Vlashi was represented by alternate shop steward Gail Washington when he met with Clark-Muhammad. Vlashi demanded a regular steward because he did not believe Washington was capable of representing him. His request was denied.

Vlashi testified that he was asked about his schedule on May 6, 12, 21, and 22. Vlashi stated to Clark-Muhammad that he clocked in and out at his regular time on those dates, but insisted that the other clock-ins and outs were done manually by a supervisor because that was how it was done when a worker was on overtime. Vlashi stated that he did not recall exactly when and what he did on those dates. He testified that the interview lasted 10−15 minutes and was told by Clark-Muhammad that he was suspended after the interview. Like Scherer and Gutierrez, Vlashi received his letter of termination on July 1 (CP Exh. 9) and stated the following

> -Falsifying, making material omissions from or tampering with any Company records, this includes obtaining employment based on false or misleading information; falsifying medical records, time records, product records, quality records, etc.
> -Leaving the work area without authorization.

Vlashi received discipline prior to his suspension and discharge, including verbal warnings, counseling, a 5-day suspension, and seven incidents of absenteeism from 1994 through 2016. His last infraction was on April 11, 2016, for poor work performance and he was given a verbal counseling (R. Exh. 9).

*The Testimony of Michael Keenan*

Clark-Muhammad was no longer employed by the Respondent at the time of this hearing and was not subpoenaed to testify. Michael Keenan (Keenan) testified that he was the Regional Business and Integrity Officer and Security Director for North America for the Respondent at the time of the three discharges. Keenan was responsible for security and compliance in the region and his duties were a combination of risk assessment, physical, and procedural security (Tr. 1000).

Keenan stated that he was informed by Clark-Muhammad of the theft of time by Vlashi, Scherer, and Gutierrez and received a copy of the time data analysis completed by Melgar (GC Exh 19). Keenan also received the analysis for Koroskoski, Zoran Naumoski, and John Manevski (R. Exh. 11). Keenan participated in the investigative interviews of all the named workers except for Scherer. Keenan did not ask any questions of his own and said each interview was 20−30 minutes on average.

Keenan was provided an outline of questions that Clark-Muhammad would ask at the interviews. He reviewed the outlines before the interviews but did not recommend any revisions on the questions. He said that Clark-Muhammad took the notes and were reviewed by him (R. Exh. 12). Keenan believed that the notes were an accurate description of the workers' responses to the questions.

Keenan was aware that each worker was suspended after the interview. Keenan believed the workers were disciplined for being out of the building for an extended period of time when they should have been working. He concluded this constituted theft of time (Tr. 1013).

Applicable Legal Standards

Section 8(a)(1) of the Act prohibits employer interference, restraint, or coercion of employees for their exercise of the rights guaranteed in Section 7 of the Act. Those rights include "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8(a)(3) prohibits employers from discriminating in regard to an employee's "tenure of employment . . . to encourage or discourage membership in any labor organization." An employer violates Section 8(a)(3) by disciplining employees for antiunion motives. *Equitable Resources*, 307 NLRB 730, 731 (1992). To establish a violation of Section 8(a)(3) and (1) in cases where a discharge is alleged in a joint employer (or successorship) context, the General Counsel has the burden to prove that the discharge of employees was motivated by employer antiunion animus.

In assessing Respondent's motive, this case is no different than any other 8(a)(3) case. The Board requires the General Counsel to make an initial showing sufficient to support an inference that the alleged discriminatees' protected conduct was a "motivating factor" in the employer's decision. Then the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct. *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB*

v. *Transportation Management Corp.,* 462 U.S. 393, 399–403 (1983); *American Gardens Management Co.,* 338 NLRB 644 (2002).

The *Wright Line* test requires the General Counsel to make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated the employer's adverse action by demonstrating that: (1) the employee engaged in union activity; (2) the employer had knowledge of that union activity; and (3) the employer harbored antiunion animus. *Amglo Kemlite Laboratories*, *Inc.*, 360 NLRB 319, 325 (2014), enfd. 833 F.3d 824 (7th Cir. 2016); *Advanced Masonry Associates, LLC*, 366 NLRB No. 57 (2018).

Discussion and Analysis

First, addressing the counsel for the General Counsel's burden of proof, I find, and it cannot be reasonably disputed, that Nafis Vlashi, Bruce Scherer, and Claudio Gutierrez engaged in union activity well known to the Respondent before their respective discipline was taken. It is also without dispute that the employer harbored antiunion sentiments against all three union officials. Various supervisors made antiunion comments to Vlashi, Scherer, and Gutierrez. None of these comments were rebutted by any witnesses testifying on behalf of the Respondent as being untrue or that such comments were not made. As such, I credit the testimony of Vlashi, Scherer, and Gutierrez that such comments by the supervisors were in fact made.

Nafis Vlashi was employed by the Respondent for over 23 years and was the president of the union local since January 2016 until the time of his termination. Vlashi also served as a steward for 8 years. Vlashi worked for the Union 3 days per week in scheduling overtime for the workers and coordinating their overtime schedule with the Respondent. Vlashi was paid by the Respondent for his union work. Vlashi also participated in negotiations over a new contract, along with Milewski and attended rallies over a new contract and to boycott the outsourcing of jobs to a foreign country. Vlashi testified that he spoke at the rallies, prepared and carried picket signs and distributed union literature. Vlashi's rallies and union events were posted on Facebook and ostensibly seen by several supervisors who were friends on social media. Vlashi, Scherer, and Gutierrez were involved in a dispute with management when the Respondent attempted to use an outside contractor on a January weekend to clean the plant when regular employees were available to perform the same duties. The three union officials elevated their dispute to John Lissi, the safety coordinator, who agreed with them and the contractor did not perform the work. Vlashi also testified that Supervisor John Laten told employees that "You guys have no contract" in March and Supervisor Mike Goodin made a similar remark about the workers not having a contract in April. Vlashi was suspended in June and discharged on July 1.

Bruce Scherer was employed for over 30 years prior to his termination. At the time of his termination, Scherer was a steward and had held that position for 20 years. Scherer, like Vlashi, also performed union business in scheduling workers for overtime 2 days per week that was sanctioned by the employer. Scherer was involved in the confrontation over the workers wearing T-shirts with the union logos when Clark-Muhammad and Charlotte Kuratli demanded that the workers return their shirts to the employer. Scherer also testified to his dispute with Supervisor Dan Calibrese over the use of utility workers in another department. In spring 2016, Calabrese told Scherer that the workers do not have a contract. Scherer was suspended in June and discharged on July 1.

Claudio Gutierrez had been employed for over 25 years at the time of his termination. Gutierrez served as a shop steward for 20 years. Gutierrez was a floor help, but assisted the employer to find staffing for overtime, as part of his union time. Gutierrez was also involved in the above incident over the staffing of a contractor to perform weekend cleanup work at the plant in January and in the employer's attempt to use utility workers to perform work outside of their job classification in March. Gutierrez testified that Supervisor Calibrese told him there was no contract and the employer can do whatever it wanted. Gutierrez testified that he argued with Dawn Sprague, who told employees they had no contract. Gutierrez also represented an employee who was not permitted to work until the following week by Clark-Muhammad after his return from short-term disability. Gutierrez further testified that he was told by Plant Manager Kuratli in May to return his T-shirt with the union logo and then Calibrese and Laten told him to take down the American flags that he posted with Vlashi and Scherer in front of the locker room. Gutierrez was suspended in June and discharged on July 1.

Having met this requisite showing that the discharged workers engaged in union activity known to the Respondent and there was antiunion animus demonstrated on the part of the employer, the burden now shifts to the Respondent to prove, as an affirmative defense, that it would have discharged the employees even in the absence of their union activity. To establish this affirmative defense "an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have been taken even in the absence of the protected activity." *L.B.&B. Associates, Inc.*, 346 NLRB 1025, 1026 (2006). "The issue is, thus, not simply whether the employer 'could have' disciplined the employee, but whether it 'would have' done so, regardless of his union activities." *Carpenter Technology Corp.*, 346 NLRB 766, 773 (2006).

Unlawful motivation is most often established by indirect or circumstantial evidence, such as suspicious timing and pretextual or shifting reasons given for the employer's actions. Discriminatory motivation may reasonably be inferred from a variety of factors, such as the company's expressed hostility towards unionization combined with knowledge of the employees' union activities; inconsistencies between the proffered reason for discharge and other actions of the employer; disparate treatment of certain employees with similar work records or offenses; a company's deviation from past practices in implementing the discharge and proximity in time between the employees' union activities and their discharge. *W.F. Bolin Co. v. NLRB,* 70 F.3d 863, 871 (6th Cir. 1995).

For the stated reasons below, I find that the Respondent has not met its burden to show that the same discipline against the discharged individuals would have been taken in the absence of their protected activity.

*Vlashi, Scherer, and Gutierrez were Singled Out for the*

*Respondent's Overtime Analysis*

Turning to the Respondent's defense, the Respondent contends that Vlashi, Scherer, and Gutierrez were discharged for essentially not working when they should have been working. All three were charged with the same infractions, to wit

> -Falsifying, making material omissions from or tampering with any Company records, this includes obtaining employment based on false or misleading information; falsifying medical records, time records, product records, quality records, etc.[13]
> -Leaving the work area without authorization.

I find that the so-called nondiscriminatory reason for the discharge of Vlashi, Scherer, and Gutierrez was clearly baseless. The attempt by the Respondent to reduce overtime hours is laudable but the study conducted by Melgar was applied in a disparate and discriminatory manner to single out the top union echelon.

Melgar said he was concerned over excessive overtime. Melgar selected 16 random weeks from 2015–2016 and selected the workers who had 80 or more hours of work in a single week. Melgar then identified a list of 59 workers who appear on this list at least once and performed an analysis of their ratio of turnstile entries and exits per days of work; verified payroll patterns for all 59 workers, verified manual clock ins; verified turnstile records to determine time elapsed on the job; and verified any discrepancies between the turnstile and payroll records.

Melgar determined that Justin Colucci, Richard Smith, Nafis Vlashi, Paul Moser, Donald Pointer, Tommy Jacobs, Michelle Barnes, and Jerzy Maciejewski had 5 or more weeks of 80 work hours or more. Scherer had only 1 week of 80 or more work hours and was situated towards the bottom of the list of 59 employees. Gutierrez' use of overtime hours was not even on the radar (GC Exh. 19 at 4).

Armed with this information, Melgar then looked at the top workers with 80 or more work hours and examined their turnstile ratios. Ostensibly, employees with high work hours would not have high turnstile entries because the workers would be working instead of entering and leaving the facility. Similarly, a high ratio of turnstile entries of workers performing overtime work would tend to establish that those workers were not working while on overtime. From the names mentioned above, only Vlashi, Pointer, Colucci, Smith, and Jacobs had high ratios of turnstile entries with high overtime hours. The worker with the highest turnstile ratio was Zoran Naumoski with 5.81, followed by Jory Stith (5.46), Semin Hadzi (5.37), Tommy Jacobs (5.71), John Moody (4.06), and Nafis Vlashi. Vlashi had a turnstile ratio of 3.76 of entries and departures over a 97-day period. Scherer's ratio was 2.02 and lower than R. Smith, Pointer, Brown, Simpson, Colucci, and M. Smith. Gutierrez was not on the list (GC Exh. 19 at 3).

The Respondent explained that Naumoski retired before he was investigated, and Tommy Jacobs' job required him to have multiple entries into the facility. Nevertheless, aside from Naumoski and Jacobs, no inspection was conducted by Melgar (or Clark-Muhammad) on the high overtime hours and corresponding high turnstile ratios of Stith, Hadzi, Moody, R. Smith, M. Smith, Pointer, Brown, Simpson, and Colucci.

I find that Vlashi, Scherer, and Gutierrez were singled out for disparate and discriminatory treatment in the manner that they were selected for review of their overtime hours and turnstile entries. Melgar admitted that he only reviewed the turnstile ratios and the recorded camera pictures of Vlashi, Scherer, and Gutierrez. Melgar never credibly explained his inspections of the entries and camera records for Scherer and Gutierrez when the two workers were not high in their turnstile ratios as compared to other workers. Indeed, Gutierrez did not even make the list of 59 workers with a high turnstile entries ratio. Further, Melgar never credibly explained the reason he did not review the turnstile entries along with any camera pictures for Stith, Hadzi, and Moody before reaching Vlashi. Melgar also never credibly explained the reason for not reviewing the turnstile entries and camera records for R. Smith, Pointer, Brown, Simpson, Colucci, and M. Smith before reaching Scherer. Melgar explained that he did not complete his review because of personal reasons and other work projects. This explanation is simply not worthy of belief given that overtime usage was a high priority with the plant manager and Melgar was given the green light to devote his time to analyze this "problem" of overtime usage.

*The Disciplinary Investigation Conducted by the Respondent was a Sham*

I also find that the investigation conducted by Clark-Muhammad once she was presented with the analysis done by Melgar on Vlashi, Scherer, and Gutierrez fell short of a fair and full investigation. The discharged employees were never provided with the employer's form 101, which credible testimony establishes that the form is presented to the union representative of the employee charged with discipline and provides a factual narrative of the employee's alleged infraction (CP Exhs. 2 and 15). The form would contain valuable information to enable the representative to discuss with the worker, such as, the infraction, time and date of the infraction, reason for the infraction, and information supporting the infraction, before the meeting with the HR department. No such forms were provided to Vlashi, Scherer, and Gutierrez.

Further, Vlashi, Scherer, and Gutierrez were never fully informed of their alleged infractions during their individual meetings with Clark-Muhammad. None received the past practice of a form 101 that would have provided the reasons and dates for the alleged infractions. All three workers credibly and consistently testified that the meetings lasted less than 10 minutes, they were never given specific dates and times of their infractions and they were not given the opportunity to explain their actions. Since all three workers testified they were not permitted to take notes during their interviews, it would have been extremely difficult for them to provide an explanation after their suspension but before their discharge for their alleged excessive absences. Indeed, none of their discharge notices referenced any specific dates and times of their alleged abuse of time and attendance.

Scherer was interrogated over his turnstile entries for May 5

[13] To be clear, there was no evidence proffered by the Respondent to show that the discharged workers falsified medical records, product records or quality records.

and 6. Scherer was not given an opportunity to review his schedule for those dates. Scherer was immediately suspended after his interview. Scherer testified he was on union business for his entire shift on May 5 and 6. I credit his testimony on this point and the record supports his explanation of being on union business for those dates (GC Exh. 17). Neither Clark-Muhammad nor Keenan reviewed his work schedule to confirm Scherer's assertion that he was on union business time on those dates.

Gutierrez' name only came up in Meglar's analysis because Koroskoski was seen on the security camera using a card to swipe out of the turnstile on May 6 that was subsequently discovered to be Gutierrez' ID card. Gutierrez was not charged with any other alleged infractions except for the May 6 incident. Gutierrez testified that he inadvertently forgot to take his wallet, which contained his ID badge on that date. Gutierrez called Koroskoski to bring down his wallet. He denied telling Koroskoski to clock him out for the day and to swipe him out of the turnstile. Koroskoski incorrectly believed he was doing Gutierrez a favor by clocking and swiping him out for the day. The Respondent did not articulate why Gutierrez' explanation was not worthy of belief. As such, I credit Gutierrez' testimony that he asked Koroskoski to bring down his wallet but denied asking him to clock and swipe him out on that day. Gutierrez' testimony showed that he was honest and had nothing to hide. There was no reason to single out Gutierrez for discharge. Gutierrez was never disciplined for past infractions of abusing time and attendance. Gutierrez had no excessive overtime usage when analyzed by Melgar. Gutierrez did not have a high turnstile ratio.

Vlashi testified that he was asked about his schedule for May 5, 12, 21, and 22. Vlashi testified that he did not recall exactly when and what he did on those dates. He told Clark-Muhammad that he clocked in and out at his regular time on those dates but insisted that the other clock-ins and outs were done manually by a supervisor because that was how it was done when a worker was on overtime. I credit Vlashi's testimony on this point because Melgar confirmed that a supervisor was indeed the person who would manually clock-in and out the workers on overtime. Consequently, the overtime recordation would not be something that Vlashi would be doing. Melgar also testified that he was also concerned whether manual punch-outs by a supervisor were the cause for the excessive overtime. Melgar recommended in November/December 2015 that only one supervisor (Nick Giulianelli) be assigned to do the manual punch-outs.

Vlashi testified that the interview lasted 10−15 minutes, and he was told by Clark-Muhammad that he was suspended after the interview. A thorough investigation was not conducted by either Clark-Muhammad or Security Director Keenan to determine if Vlashi was indeed excused from working on those dates in question. Elainy Borrero (Borrero) testified that she was and is the master scheduler for the past 3 years for the Respondent and is responsible for the schedule of work for the plant workers. Borrero testified that a worker on union business would not need permission because HR would have already informed her that the worker was on union business for that entire shift (Tr. 1116, 1117). Borrero testified that Vlashi was on union business according to his work schedule for May 5 and 12 (Tr. 1126, 1127; CP Exhs. 27, 28). As such, Clark-Muhammad knew that Vlashi was on union business for May 5 and 12 because her HR department would have already informed Borrero of the same. Nevertheless, Clark-Muhammad charged Vlashi for not working on those 2 days. With regard to May 21 and 22, I credit Vlashi's testimony that a supervisor continued to manually punch in and out Vlashi's overtime hours. The Respondent proffered no credible evidence that Clark-Muhammad had investigated the veracity of this explanation or had provided a rebuttal to Vlashi's explanation.

All three were immediately suspended following the investigative meeting which one could reasonably conclude that the investigation was already completed before their meeting and that the meeting was merely a pro forma exercise by the Respondent. This is evident since the record is devoid of any credible evidence of a meaningful investigative follow-up that was conducted by the Respondent to determine the veracity of the explanations provided by the workers before they were discharged. An employer's failure to conduct a meaningful investigation and to give the alleged discriminatee an opportunity to explain demonstrates discriminatory intent. *Andronaco*, 364 NLRB No. 142 (2016), slip op. at 14, citing inter alia, *Ozburn-Hessey Logistics, LLC v. NLRB*, 609 Fed. Appx. 656, 658 (D.C. Cir. 2015), enfg. 357 NLRB 1632 (2011). Also see *Sociedad Esponanola de Auxilio Mutuo Y Benefencencia de P.R.*, 342 NLRB 458, 459–460 (2004), enfd. 414 F.3d 158 (1st Cir. 2005).

The Board has held that an employer's failure to conduct a fair and full investigation into the incident causing the employee's discharge and to give the employee the opportunity to explain his action before imposing discipline is a significant factor in finding discriminatory motivation. *Publishers Printing Co.*, 317 NLRB 933, 938 (1995), enfd. 106 F.3d 401 (6th Cir. 1996).

*The Discharges were Inconsistent with the Treatment of Other Workers with Similar Infractions*

The parties argued over whether there was disparate treatment of the union officials discharged as compared to other similarly situated employees who were not subject to the same discipline. The Respondent maintains that it has the full power to discipline and discharge employees under the CBA (GC Exh. 3: art. 34) and has the absolute right to determine the level of discipline (GC Exh. 3: art. 40). The counsel for the General Counsel argues that discipline is imposed following progressive discipline practices.[14] I do not need to determine whether there was progressive discipline in place at the facility or that the Respondent has the absolute power to determine the extent of discipline. It is sufficient to find a violation of the Act when the three workers were disparately treated, and their discharges were motivated by their union status and activity in support of the Union.

The counsel for the Respondent argues that there was no disparate treatment of the discharged employees. DiStefano testified that she was aware of the discharges of Vlashi, Scherer, and Gutierrez. She indicated that she had reviewed the report of

[14] I would note that Donald Kalemba, maintenance and planner supervisor testified below that there was a progressive discipline policy in place at the Fair Lawn plant.

overtime pattern prepared by Melgar and the 59 employees with excessive and multiple turnstile entries. DiStefano was aware that a worker, John Manevski had excessive time out of the building during his work shift on February 19, 20, April 25, May 7 and June 4 and 11 (R. Exh. 11) and was subsequently terminated on July 1 for irregularities in his time and attendance. Manevski was not one of the 59 employees with a high ratio of turnstile entries. She was also aware that Koroskoski was terminated on July 1 for a similar infraction (R. Exh. 14). Koroskoski was also not one of the 59 employees.[15] DiStefano also pointed out that Christian R. Barreto was also frequently outside of the building but was not discharged.

Christian R. Barreto (Barreto) testified that he is not a union official and was indeed questioned by Clark-Muhammad regarding his frequent departures from the building on about June 15. Barreto replied that he is a frequent smoker and was taking smoke breaks on that day when he lost his wallet. Barreto admitted to walking around the turnstile to reenter the building and was caught on the security camera. Barreto received a 3-day suspension for going around the turnstile for June 15. Barreto has also been disciplined before for extended breaks in the past with a 5-day suspension in 2015 (Tr. 758−770; GC Exh. 18). DiStefano testified that Barreto was not discharged because there was no intent to deceive and that he had left the building by signing in and out of the lobby security log only for a smoke (Tr. 1169−1171).

While DiStefano's testimony may seem to indicate that workers not holding union positions or engaged in union supported activity were also discharged (Manevski and Koroskoski) and discipline was mitigated with a believable explanation as in the case of Barreto, I am still troubled over the disparity of treatment of the three discharged employees as compared to literally, hundreds of multiple entries of the 59 employees that were not investigated further by the HR department. Indeed, the record shows that since 2014, the discipline imposed for abuse of time and attendance were mainly counseling, verbal and written warnings and some suspension of 10 days or less (CP Exh. 15). I also note that DiStefano testified that she did not recall if other names were raised and that she did not recall if the 59 employees with multiple turnstile entries were considered for further inspection or discipline. DiStefano did not instruct Clark-Muhammad to review turnstile entries of the 59 employees (Tr. 1207, 1208).

Specifically, in the comparison of Gutierrez with Barreto, Clark-Muhammad did not extend the same benefit of doubt to Gutierrez' explanation that he too, like Barreto, forgot his wallet and that Koroskoski inadvertently used Gutierrez' badge to swipe him out. Gutierrez credibly testified that he instructed Koroskoski to bring down his wallet and not to swipe him out. Gutierrez was discharged for this single incident. As already noted, Gutierrez had no prior discipline for time and attendance abuse; he was not one of the 59 employees filtered by Melgar; and his testimony was equally credible as was the testimony of Barreto. In contrast, Barreto has been disciplined in the past for abusing his break time with a 5-day suspension in 2015. DiStefano testified that Barreto had no intent to deceive and therefore, he received a 3-day suspension.[16] However, Barreto had already served a 5-day suspension in 2015 and therefore his discipline for a second violation of the same infraction in 2016 should have been more severe. Further, there is no evidence to suggest that the Respondent found the testimony of Barreto more credible or that it doubted the veracity of Gutierrez' testimony because Clark-Muhammad did not testify as to her rationale for recommending his discharge. *Windsor Redding Care Center, LLC*, 366 NLRB No. 127 (2018).

Clark-Muhammad also treated Scherer in a disparate manner when she failed to consider the objective record that Scherer was on 100 percent union business on the two dates (May 5 and 6) that he was charged with abusing his time and attendance. I credit Scherer's testimony that while he was on union business, he would not be working his routine duties and would be free to enter and leave the building in order to seek out a supervisor or a worker about overtime work.

With regard to Vlashi, Borrero, who was the master scheduler for the Respondent, provided undisputed testimony that showed Vlashi was also on union business according to his work schedule for May 5 and 12 (Tr. 1127, 1128; CP Exhs. 27 and 28). Inasmuch as Clark-Muhammad did not testify, no explanation has been provided for the rationale in rejecting the explanation provided by Vlashi that he was on union business on May 5 and 12 and that a supervisor would manually clock him in and out of overtime on the other dates in question.

Respondent presented no conclusive evidence that Vlashi, Gutierrez, and Scherer were treated similarly to other employees disciplined for bad behavior. *Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 219 (D.C. Cir. 2016), enfd. 361 NLRB 921 (2014), and 362 NLRB 977 (2015) (disparate treatment discussion).[17]

*The Timing of the Discharges Demonstrates Antiunion Animus*

I find that the timing of the discharges, shortly after Vlashi, Scherer, and Gutierrez voiced their support for the Union's effort to negotiate a new contract and to protest the outsource of work to a foreign country supports an inference that the Respondent's discipline was motivated by their support for the Union. *State Plaza Hotel*, 347 NLRB 755, 755−756 (2006); *Toll Mfg. Co*., 341 NLRB 832, 833 (2004); *Davey Roofing, Inc*., 341 NLRB 222, 223 (2004) (temporal proximity between union activity and employer's adverse action is evidence of unlawful motivation).

Vlashi, Gutierrez, and Scherer were discharged in July when the Union was engaged in contract negotiations with the employer in the spring. They engaged in rallies in support of a contract and in protests over the outsourcing of work. They confronted Respondent supervisors over violations of the expired

[15] According to DiStefano's testimony, Melgar was instructed by Clark-Muhammad to inspect the turnstile entries and time out of the building for Manevski and Barreto. No rationale was provided as to why other workers with equally high entries were not investigated.

[16] It is unclear to me how DiStefano could testify that Barreto had no intentions to deceive since she was not present during the interview of Barreto to ascertain his state of mind.

[17] The fact that certain workers not involved in union activity were also discharged does not rule out a finding that the discharge of Vlashi, Gutierrez, and Scherer was unlawfully motivated. *Flat Rate Movers, Ltd*., 357 NLRB 1321, 1328 (2011).

contract and were told there was no longer a contract. They wore and asked workers to wear T-shirts with the union logo and were instructed to return their T-shirts by the Plant Manager Kuratli and Clark-Muhammad. This timing represents significant evidence of unlawful motivation. While some supervisors denied knowledge of the activities in support of the Union by the discharged workers, it is without doubt that Kuratli and Clark-Muhammad were fully aware of their union status and support of the Union. Such coincidence in time between Respondent's knowledge of the employees' union activity, and their discharge is strong evidence of an unlawful motive for his discharge. *Trader Horn of New Jersey,* 316 NLRB 194, 198 (1995). Indeed, as recognized by the Board, the "timing alone may suggest anti-union animus as a motivating factor in an employer's action." *Inova Health System v. NLRB*, 795 F.3d 68, 82 (D.C. Cir. 2015); *Advanced Masonry Associates, LLC*, 366 NLRB No. 57 (2018). As stated by the administrative law judge in *AdvoServ of New Jersey*, 363 NLRB No. 143 slip op. at 31 (2016), "Indeed, "timing alone may be sufficient to establish that union animus was a motivating factor in a discharge decision." *Sawyer of NAPA,* 300 NLRB 131, 150 (1990); *NLRB v. Rain-Ware,* 732 F.2d 1349, 1354 (7th Cir. 1084); *NLRB v. Windsor Industries,* 730 F.2d 860, 864 (2d Cir. 1984); *Manor Care Health Services—Easton,* 356 NLRB 202, 204, 226 (2010) (Proximity in time between discriminatee's union activity and discharge supports finding of unlawful motivation for the termination); *LaGloria Oil & Gas,* 337 NLRB 1120, 1123, 1132 (2002). ("Discharge shortly after Employer learned of employee's union activities, strongly supports a finding that discharge motivated by union animus").

Accordingly, I find that the Respondent has demonstrated antiunion animus in violation of Section 8(a)(3) and (1) when it discharged Vlashi, Scherer, and Gutierrez. I find that their discharge was motivated by their union support and activity for Local 179, and that the Respondent failed to meet its burden of persuasion to demonstrate the same action would have taken place even in the absence of the protected conduct. *Wright Line*, above at 1089.

5. The Suspension of Richard Nazzaro

The counsel for the General Counsel alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by suspending Richard Nazzaro because he engaged in union or protected concerted activity (GC Br. at 18).

Richard Nazzaro (Nazzaro) has been employed as a welder mechanic for the past 9 years and is supervised by Don Kalemba, the senior maintenance supervisor. Nazzaro holds the position of shop steward and union local vice-president since 2014. Nazzaro has been involved with the contract negotiations between the union and the Respondent. Nazzaro participated in the union rallies for a new contract during the April-May timeframe. Nazzaro was also one of the workers who had worn a T-shirt with the union logo to work and was told to give up the shirts by the plant manager.

Nazzaro stated that he works the first shift from 7:30 a.m. to 3 p.m. He is aware that all maintenance and repair workers, approximately 30 employees would attend a hand-over meeting between 7 and 7:15 a.m. before the start of the first shift. Nazzaro testified that the purpose of the morning meeting was for the first shift supervisor to ask the previous (third) shift supervisor for any outstanding work issues and then the first-shift workers would "hand-over" the work that needed to be finished. After it was determined if there were outstanding or unfinished work, the first-shift workers would receive their assignments. Similarly, the purpose of the afternoon hand-off meeting was to have the workers inform the supervisor of any outstanding or unfinished assignments and that information would be conveyed to the third shift supervisor and workers. Nazzaro testified that a supervisor may not always attend the meetings. On those occasions, the workers would leave the work orders on the table and leave the room (Tr. 291).

Joshua Miles (Miles) testified as the maintenance planner and was responsible for scheduling work, delivering work orders, and setting up new equipment. Miles testified to the necessity of having start-up and end of shift meetings in order for accountability of everyone's work and to make sure everyone is there to receive their work orders and to have good communications between the shifts (Tr. 1087−1088).

Nazzaro was suspended by Supervisor Donald Kalemba following a morning meeting on about June 12. Nazzaro said he was charged with failing to attend the afternoon meetings on June 8, 9, and 10. Nazzaro was suspended for 3 days on June 13, 14, and 15 and resumed work on June 18 (Tr. 317, 333; R. Exh. 5).

Nazzaro explained that no one was at the afternoon meeting except for Mark Sickles and Leon Koroskoski on June 8. Nazzaro further testified that he attended a labor-management meeting on June 9 and assumed that the human resource department would've informed his supervisors that he was attending the management meeting. Nazzaro insisted that he was present at the June 10 meeting.

Nazzaro said that he had spoken to the maintenance manager, Ryan Martinez, about conflicts with the meetings and his union duties. Nazzaro also stated that he is delayed on occasions in attending the meetings because workers would ask him questions in his role as a union official. According to Nazzaro, he was told by Martinez that he had to make the meetings on time and to do his union work after the meetings.

Nazzaro admitted to missing two meetings in June and was disciplined with a counseling and verbal warning in 2014 and 2015 for failing to complete his work assignments. Nazzaro had no prior suspension prior to June (Tr. 337; R. Exhs. 6, 7, and 8).

Mark Sickles (Sickles) has been employed by the Respondent for over 32 years as a mechanic and started working in building and trade since April 2016. Sickles has attended hand-off meetings for the past 2 years and knew that attendance was required. He testified that there is a hand-off meeting after the first shift, which starts at 7 a.m. and ends at 3 p.m. Sickles testified that the purpose of the shift meetings was to inform the supervisor(s) of the work that was accomplished on the shift and the work that needed to be continued by the following shift. Sickles stated that there is a hand-off meeting at the beginning of his shift and at the end of his shift (Tr. 375).

Sickles opined that Nazzaro has been singled out and the supervisors would constantly inquire in the morning and afternoon hand-off meetings about Nazzaro's whereabouts. Sickles also noted that supervisors are "quite often" not present at the

afternoon meetings and the workers would then just place their paperwork on the desk, wait a couple of minutes and leave the room.

Sickles stated that he was present at the June 10 meeting and affirmed that Nazzaro was present on June 10. Sickles recalled that he was standing next to Nazzaro against the wall. Sickles (who was an alternate shop steward) was aware that Nazzaro was at a labor management meeting on June 9. Sickles did not testify whether or not he and Nazzaro were present at the June 8 meeting (Tr. 378, 379).

On cross-examination, Sickles admitted that he has been told by Kalemba on at least two or three times that he must attend the morning and afternoon meetings. Sickles, however, said that he was never disciplined for his non-attendance even though he admittedly missed the meetings two or three times per week. On other occasions, Sickles would inform his supervisor that he was still working on a job. Sickles has received verbal warnings and counseling for his nonattendance but has never been suspended.

Leon Koroskoski (Koroskoski) has been employed as a maintenance mechanic/machinist at the Respondent's Fair Lawn facility for over 34 years. Koroskoski has been supervised by Kalemba since 2016. Koroskoski, like Sickles, worked the first shift from 7 to 3 p.m.

Koroskoski is familiar with the hand-off meetings. He stated that the first meeting starts before the 7 a.m. shift and the afternoon meeting is at 2:45 p.m. He stated that the purpose of the meeting was for the workers to be informed of the work from the previous shift and to inform the supervisor of the follow-up work needed for the next shift. Koroskoski stated that Kalemba and all the supervisors are usually present at the morning shift but not all during the afternoon shift. Koroskoski testified that if there are no supervisors present at the afternoon shift, the workers would leave the paperwork on the table and then leave the room.

Like Sickles, Koroskoski knows Nazzaro and believed that he was singled out by Kalemba. Koroskoski has observed Kalemba asking for Nazzaro at the meeting, even on the occasions when Nazzaro was present. Koroskoski is not aware of any other workers who are called out by Kalemba for their attendance at the meeting. Koroskoski was aware that Nazzaro was suspended for failing to attend the meetings on June 8, 9, and 10. Koroskoski insisted that he was in attendance with Nazzaro at the June 8 meeting, but no supervisors were present, so they left. Koroskoski did not recall seeing Nazzaro at the meeting on June 9. Koroskoski testified that Nazzaro was present in the second room at the June 10 meeting.

Koroskoski said that he has not attended the meetings when he is working on an emergency assignment and has never been disciplined for not showing up at the meeting although he has missed meetings at least 3 or 4 times. He has also observed that there have been no supervisors present at the meetings on 4 or 5 occasions in the past year.

Donald Kalemba (Kalemba) has been employed for over 18 years as the maintenance supervisor and planner for the Respondent. It is his responsibility to plan and schedule the work for the maintenance department. Kalemba supervises up to 30 workers. Kalemba testified that all workers are required to attend the start-up morning meeting and the end-of-shift meeting for the first shift (7 a.m.-3 p.m.). Kalemba stated that the meetings are usually over within 15 minutes. He stated that the facility operates on three shifts and the purpose of the meeting is to

> …convey the information that happened from the previous shift over to the next shift. So in our case on first shift, we meet third shift information. We meet with the supervisor. He conveys all of the issues that happened, anything that's pertinent as far as machine down time or significant breakdowns. And then also first shift, we communicate, mean the -- basically, the format is that we talk about safety first, anything that occurred during the previous day or any watchouts on regardless -- regarding the safety… . And to hand out work orders to for the day… . The end-of-shift meeting starts at 2:45 p.m. It basically is a recap of the day. We will review work assignments, whether they were completed or not. We will collect work orders back from the craftsmen. Also, if there are any outstanding issues going into second shift that need to be conveyed to them that they need to follow up on (Tr. 1042–1044).

Kalemba suspended Nazzaro for failing to attend the DMS (Daily Management System) hand-off meetings. Kalemba noted that Nazzaro received prior discipline for not attending DMS meetings (R. Exhs. 6 and 7). Nazzaro received counseling and a verbal warning in 2014 for not attending the DMS meetings. Kalemba testified that Nazzaro was also issued a written warning for not attending a DMS meeting in March 2016 (R. Exh. 8).

Kalemba denied singling out Nazzaro for disparate treatment and noted that Fred Marshall and Ryan Martinez had previously spoken to Nazzaro for failing to attend DMS meetings (R. Exh. 13). Kalemba stated that Nazzaro's attendance did not improve and was issued a suspension for 3 days because of his non-attendance on June 8, 9, and 10, 2016 (R. Exh. 5). Kalemba testified that Nazzaro told him that he was at a union meeting on June 9. Kalemba responded that the appropriate procedure is for Nazzaro to notify a supervisor.

Fred Marshall (Marshall) testified that Nazzaro worked under his supervision from June 2012 to 2014. Marshall testified that he was aware that Kalemba has spoken to Nazzaro about attending the meetings at the beginning and ending of the shift. Marshall said he has given Nazzaro repeated instructions to attend the meetings and denied telling Nazzaro that it was alright not to attend the meetings.

It is noted that Nazzaro was instructed as early as January 2014 by Marshall that it was Nazzaro's responsibility to inform his supervisor if he was attending union business and if he cannot attend the hand-off meetings, he must inform the supervisor the reason why he cannot attend the meeting (R. Exh. 13).

In contrast to the testimony of Sickles and Koroskoski, Kalemba disputed that Nazzaro was in attendance on June 8 and 10. He stated that there was no possibility that he would not have seen Nazzaro at the DMS meeting if he was present. Kalemba denied that Nazzaro's union activity or his position in the Union played a role in the discipline. Kalemba stated that he was not aware if Nazzaro attended union rallies or had worn a T-shirt with the union logo prior to his discipline.

On cross-examination, Kalemba explained he was present at the meetings on June 8, 9, and 10 and would have seen Nazzaro. Kalemba also stated that Nazzaro was not in the smaller

adjourning room because the workers are instructed to attend the meeting in the larger room and, in any event, Kalemba stated that there is a cut-out window between the two rooms and he would have seen Nazzaro if he was in the second room. Kalemba did not deny that Mike Sickles stated that Nazzaro was in attendance on June 10 and that Sickles was never disciplined for his nonattendance. Kalemba testified that Sickles has not been disciplined because he was never a frequent offender (like Nazzaro) in not making the meetings (1074, 1075).

Discussion and Analysis

To establish a violation of Section 8(a)(3) and (1), the General Counsel has the burden to prove that the suspension of Nazzaro was motivated by the employer's antiunion animus. As noted above, the Board requires the General Counsel to make an initial showing sufficient to support an inference that the alleged discriminatee's protected conduct was a "motivating factor" in the employer's decision and the burden then shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct. *Wright Line,* above. Upon my review, I find that the counsel for the General Counsel has met her burden. I also find that the Respondent articulated a legitimate and nondiscriminatory rationale for suspending Nazzaro and that the same discipline would have taken place even in the absence of his protected conduct. I do not credit Nazzaro's testimony with regard to his explanation on his suspension.

First, this is not the first time that Nazzaro has missed the required meetings in the past 2 years. Nazzaro has a history of poor performance and work rule violations. As presented by the Respondent, Nazzaro received counseling for failure to perform work in a timely manner in July 2014 (R. Exh. 6), a verbal warning for poor performance in August 2014 (R. Exh. 7), and a written warning in March 2016 for failing to attend start-up meetings. On June 8, 9, and 10, 2016, Nazzaro again failed to attend the start-up meetings and was issued a 3-day suspension (R. Exh. 13). Martinez and Marshall had also spoken to Nazzaro about his failure to attend the DMS meetings (Tr. 1103−1105; R. Exh. 13). The severity of the discipline in light of his prior transgressions and ample past notice and counseling about his poor attendance at the meetings was progressive and not disparate because of his union status or protected activity.

Second, Nazzaro testified that he was at the afternoon meeting on June 8 and that only Sickles and Koroskoski were present with him, so they left their work orders on the table and departed. Kalemba testified that there was actually a meeting on June 8, and he attended the meeting and addressed the workers. Kalemba testified that at the time Nazzaro was given his suspension, he made no claim he was in attendance at the June 8 meeting and that they left when no meeting was held (Tr. 1058). I credit Kalemba's testimony over that of Nazzaro and Koroskoski. It is simply nonsensical for Nazzaro and Koroskoski to testify that no one attended the meeting when the meetings are usually attended by over 30 workers and supervisors and none attended the June 8 meeting except for him and Koroskoski. I would also note that Sickles, who Nazzaro testified was present with him and Koroskoski on June 8, never testified that he left when no meeting was held on June 8.

Third, Nazzaro testified that he attended a labor-management meeting on June 9. At the hearing, Nazzaro claimed that Martinez and he had an agreement that Nazzaro could miss meetings to attend to union business. Even if that was true, I credit Kalemba's testimony that it was Nazzaro's obligation to inform his supervisor that Nazzaro was attending to union business (Tr. 1057, 1058). According to Nazzaro, he was instructed by Martinez to inform a supervisor if he could not attend a meeting due to any union business. Sickles testified that he would inform his supervisor that he was still working on a job and could not attend the meeting. It would be equally reasonable for Nazzaro to inform his supervisor if he was attending to union business and could not attend the start-up meeting.

Fourth, Nazzaro testified that he was present at the June 10 meeting but standing against the wall in an adjoining room. Kalemba testified that the workers were instructed to attend the meeting in the larger room. Kalemba further testified he was present and did not see Nazzaro, even if Nazzaro was in the adjoining room (Tr. 1059). I credit Kalemba's testimony on this point inasmuch as Nazzaro, Sickles, and Koroskoski had testified that Kalemba would frequently call out Nazzaro's name even when he was present at the meetings. No such testimony was provided by the three workers that Kalemba had called out Nazzaro's name on June 10 or that Nazzaro had responded in the affirmative that he was present.

Accordingly, I find that the 3-day suspension of Nazzaro on about June 13, 2016, by the Respondent was not motivated by Nazzaro's union status and/or his activity in support of the Union and that the same action would have been taken absent Nazzaro's protected status and activity. I recommend the dismissal of this allegation in the complaint.

CONCLUSIONS OF LAW

The Respondent Mondelez Global, LLC is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union, Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, Local 719, AFL−CIO is a labor organization within the meaning of Section 2(5) of the Act.

The Union is, and at all material times, has been the exclusive bargaining representative for the following appropriate unit:

> The baking, packing, warehouse, environmental, maintenance and repair, distribution and garage employees working at the Fair Lawn facility, excluding supervisors.

The Respondent violated Section 8(a)(3) and (1) of the Act by suspending and discharging Claudio Gutierrez, Bruce Scherer, and Nafis Vlashi.

The Respondent violated Section 8(a)(5) and (1) of the Act when on about March 15, 2016, the Respondent changed the length of time an employee must wait after submitting a doctor's note before returning to work from an absence of 5 or more days.

The Respondent violated Section 8(a)(5) and (1) of the Act when in about June 2016, the Respondent changed the work schedules of the B and R Processors who work in its warehouse.

The Respondent violated Section 8(a)(5) and (1) of the Act when in about December 2016, the Respondent changed again the work schedules of the B and R Processors who work in its warehouse.

The Respondent violated Section 8(a)(5) and (1) of the Act when in March 2016, by Human Resources Director Clark-Muhammad, the Union was told that joint meetings would be held with the new hires and about May 2016, by Human Resources Assistant Tasha McCutcheon, the employer will begin having one of its representatives accompany the union representative when he met with employees at new orientation.

The Respondent violated Section 8(a)(5) and (1) of the Act when since May 2016, it unreasonably delayed, failed and refused to provide the Union with the information of the names of anyone disciplined for violations of its clock-in-clock-out policy from March 1, 2006, through March 1, 2016.

The Respondent violated Section 8(a)(5) and (1) of the Act when it unreasonably delayed, failed and refused to provide the Union since July 7, 2016, with the information concerning new hires.

The unfair labor practices set forth above affect commerce within the meaning of the Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

The Respondent did not violate Section 8(a)(3) and (1) of the Act when it suspended Richard Nazzaro for 3 days on about June 13, 2016.

The Respondent did not violate Section 8(a)(5) and (1) of the Act when it on about April 2016, selected employees for layoffs who were not the most junior employees.

The Respondent did not violate Section 8(d) of the Act when it allegedly ceased to honor employee authorizations for dues deduction in and after May 2016.

The Respondent did not otherwise violate Section 8(a)(5), (3), and (1) of the Act in the manner alleged in the complaint.

## REMEDY

Having found that the Respondent Mondelez Global, LLC had engaged in certain unfair labor practices, I shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent shall be required to rescind, on the Union Local 719's request, any or all of the unilateral changes to the unit employees' terms and conditions of employment made on or after March 15, 2016.

The Respondent Mondelez Global, LLC shall be required to offer reinstatement to Claudio Gutierrez, Bruce Scherer, and Nafis Vlashi for their discriminatory suspensions and discharges and to make them whole for any loss of earnings and other benefits suffered as a result of their unlawful discharges. Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

The Respondent will also be required to expunge from its files and records any and all references to the unlawful suspensions and discharges of Gutierrez, Scherer, and Vlashi and notify the affected employees in writing that this has been done and that the disciplines will not be used against them in any way.

The Respondent additionally shall be ordered to (1) compensate Vlashi, Scherer, and Gutierrez for their suspensions and discharges for their loss of wages caused by the unlawful discipline and any adverse income tax consequences of receiving their backpay in one lump sum and (2) file a report with the Social Security Administration allocating the backpay to the appropriate calendar quarters, as set forth in *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB 101 (2014). Consistent with the Board holding in *AdvoServ of New Jersey*, 363 NLRB No. 143 (2016), the Respondent shall be required within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, to file its report allocating backpay with the Regional Director and not with the Social Security Administration. The Respondent will be required to allocate backpay to the appropriate calendar years only.

I also shall order the Respondent to post the Board's standard Notice to Employees.

## ORDER

On these findings of facts and conclusions of law and on the entire record, I issue the following recommended[18]

The Respondent Mondelez Global, LLC shall

1. Cease and desist from

(a) Altering the unit employees' terms and conditions of employment without first notifying Local 719 and bargaining to agreement or impasse regarding such changes in the wages, hours, and working conditions of the unit employees.

(b) Discriminatorily disciplining employees because of their union activities or to discourage employees from engaging in union or other protected concerted activities.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Claudio Gutierrez, Bruce Scherer, and Nafis Vlashi whole for any loss of earnings and other benefits, including reimbursement for all search-for-work and interim-work expenses, regardless of whether they received interim earnings in excess of these expenses, suffered as a result of the unlawful discharges, as set forth in the remedy section of this decision.

(b) Compensate Claudio Gutierrez, Bruce Scherer, and Nafis Vlashi for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and to file with the Regional Director for Region 22 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(c) Immediately offer full reinstatement to Claudio Gutierrez, Bruce Scherer, and Nafis Vlashi and if the offer is accepted, reinstate Gutierrez, Scherer, and Vlashi to their former jobs or, if the jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Within 14 days from the date of the Board's Order,

[18] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

remove from its files any reference to the unlawful suspensions on about June 15, 2016, and discharges on about July 1, 2016, of Gutierrez, Scherer, and Vlashi, and thereafter notify them in writing that this has been done and that their suspensions and discharges will not be used against them in any way.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay. Absent exceptions as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its existing property at the Fair Lawn facility, New Jersey, a copy of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 15, 2016.

(h) Mail a copy of said notice to Gutierrez, Scherer, and Vlashi, at their last known addresses.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 22, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(j) If Respondent has gone out of business or closed the facility involved in this proceeding, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at its Fair Lawn, New Jersey facility at any time since March 15, 2016.

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT make any unilateral changes to the hours, or terms and conditions of employment of the unit employees without first notifying the Bakery, Confectionery, Tobacco Workers, and Grain Millers International Union, Local 719 and giving it a meaningful opportunity to bargain about such changes to agreement or impasses regarding such changes in the hours and working conditions of the unit employees.

WE WILL NOT discriminatorily discipline you because of your union activities or to discourage employees from engaging in union or other protected activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Claudio Gutierrez, Bruce Scherer, and Nafis Vlashi full reinstatement to their former jobs or, if the jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Claudio Gutierrez, Bruce Scherer, and Nafis Vlashi whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest, including any pay increases made to similarly situated employees from the date of their discharges to the present, and including reimbursement for all search-for-work and interim-work expenses, regardless of whether they received interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall backpay period.

WE WILL, within 14 days from the date of the Board's Order, remove from our files all references to the unlawful suspensions and discharges of Claudio Gutierrez, Bruce Scherer, and Nafis Vlashi.

WE WILL, within 3 days thereafter, notify Claudio Gutierrez, Bruce Scherer, and Nafis Vlashi in writing that this has been done and that their suspensions and discharges will not be used against them in any way.

WE WILL, upon request of the Union, rescind any or all of our unlawfully imposed changes and restore the terms and conditions of employment that existed prior to March 15, 2016.

[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

MONDELEZ GLOBAL, LLC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/22-CA-174272 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.